DISSENTING OPINION OF JUDGE *AD HOC* KREĆA

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I. General Issues

1. The consistency as a purported principle of the majority reasoning

1. It seems that the principle of judicial consistency understood as "consistency with its own past case law. . . especially. . . in different phases of the same case or with regard to closely related cases" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 330, para. 3; joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby) should have been the essence of the majority reasoning in the present case. Even for the standards of the Court itself in whose jurisprudence the principle of consistency has a prominent place, there is a conspicuous reference to the course "not. . . to depart from previous findings, particularly when similar issues were dealt with in the earlier decisions, as in the current case" (Judgment, para. 104) or similarly couched (*exempli causa*, *ibid*., paras. 53, 54, 71, 76, 141).

2. The consistency as such may *in concreto* be evaluated at three levels:

(a) consistency *in casu* (horizontal consistency);

(b) limited vertical consistency, i.e., consistency in cases in which the Federal Republic of Yugoslavia (FRY)/Serbia was involved as a party; and

(c) general vertical consistency in terms of the consistency of decisions taken by the Court in cases in which the FRY/Serbia was involved, in the light of the general jurisprudence of the Court on relevant issues.

3. It appears that the application of the principle of consistency *in casu* was a difficult task, as regards the *jus standi* of the FRY/Serbia even an impossible mission, due to heterogeneous decisions taken by the Court in

the earlier cases in that respect as well as in respect of the status of the FRY/Serbia vis-à-vis the United Nations as its determinative.

4. In that regard, the decisions of the Court in the earlier cases may be divided into three groups:

(a) decisions based on avoiding or ignoring the position as regards the *jus standi* of the FRY/Serbia;
(b) decisions involving some elements or *indicae* of the *jus standi* of the FRY/Serbia; and
(c) decisions based on substantive assessment, whether positive or negative, of the *jus standi* of the FRY/Serbia.

5. The explicit avoidance position was taken by the Court in its Orders of 8 April 1993 in the *Bosnia* case and 2 June 1999 in the *Legality of Use of Force* cases. In its Order of 8 April 1993 the Court found, *inter alia*, that in resolution 47/1 "the solution. . . is not free from legal difficulties" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))*, *Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 14, para. 18), but decided that the question is one which "the Court does not need to determine definitively at the present stage of the proceedings" *(ibid.)*.

Since the FRY/Serbia could have the status of a party in the Court only on the basis of its membership in the United Nations, the meaning of the finding regarding the *jus standi* of the FRY is that it, as such, "is not free of legal difficulties". That position was slightly modified in its Order of 2 June 1999 by stating that it "need not consider this question for the purpose of deciding whether or not it can indicate provisional measures in the present case" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 136, para. 33).

6. In the Judgment on Preliminary Objections in the *Bosnia* case, which would have been the proper place for the decision as to whether the fundamental condition of *jus standi* (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46) had been fulfilled, the Court put the issue of the *jus standi* of the FRY under the carpet. It satisfied itself by the finding that "Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 610, para. 17) and since Bosnia and Herzegovina "became a Member of the United Nations. . . on 22 May 1992" (*ibid.*, p. 611, para. 19) and as such "could become a party to the Convention through the mechanism of State succession" (*ibid.*, p. 611, para. 20), it came to the conclusion that "all the conditions are now fulfilled to found

the jurisdiction of the Court *ratione personae*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 613, para. 26). The approach could be called the implicit avoiding position or, perhaps more properly, the ignoring position as regards the *jus standi* of the FRY. (The implicit avoiding position is basically the substance of the joint declaration of seven judges on the *Legality of Use of Force* cases also (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 330-334.) For, if the Court would consider itself not competent on considerations *ratione temporis* and *ratione materiae*, as was argued in the joint declaration, then the question of the *jus standi* of the FRY would be set aside, and would be substantially disqualified as an antecedent condition of the jurisdiction of the Court.)

7. In the decisions of the Court involving some elements or *indicae* of substantive assessment of the *jus standi* of the FRY, one could include the Order of 8 April 1993 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and the 2003 Judgment in the *Application for Revision* case.

The Order of 8 April 1993, apart from the finding that the solution adopted by General Assembly resolution 47/1 "is not free from legal difficulties", adduced another consideration namely, that

> "proceedings may validly be instituted by a State against a State which is a party to. . . a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (cf. *S.S. "Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 6)" (para. 19 of the Order)[1] .

In its Judgment in the *Application for Revision* case (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 7), the Court entered into the assessment of both the *jus standi* of the FRY and its determinative — the status of the FRY vis-à-vis the United Nations. As regards the status of the FRY vis-à-vis the United Nations a notion *sui generis* of membership was constructed.

8. The Court, considering General Assembly resolution 55/12 of 1 November 2000 by which FRY/Serbia was admitted to the United Nations as a new Member, points out, *inter alia*, that it

[1] The consideration proved to be erroneous in the light of the eight Judgments of the Court in the *Legality of Use of Force* cases (*(Serbia and Montenegro* v. *Belgium), I.C.J. Reports 2004 (I)*, pp. 323-324, paras. 113-114).

> "cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention. Furthermore, the letter of the Legal Counsel of the United Nations dated 8 December 2000, cannot have affected the FRY's position in relation to treaties." (*Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 31, para. 71.)

(Apart from the substantive validity of the position taken, two observations seem to be of interest. First, the assessment of the status of the FRY took place almost a decade after Bosnia and Herzegovina submitted its Application to the Court, and over four years since the admission of the FRY to the United Nations as a new Member. Second, the assessment is, by its nature, an *obiter dictum* exceeding the competence of the Court in the revision procedure which, in the sense of Article 61 of the Statute, should have confined itself to the issue whether the admission of the FRY to the United Nations as such is a "new fact".)

Regarding the *jus standi* of the FRY, the Court noted that: "Resolution 47/1 did not *inter alia* affect the FRY's right to appear before the Court. . . under the conditions laid down by the Statute. Nor did it affect the position of the FRY in relation to the Genocide Convention." (*Ibid.*, p. 31, para. 70.)

9. The Court performed substantial assessment of *jus standi* in two cases: in the *Legality of Use of Force* cases, the Court found that the FRY was deprived of the right to appear before it due to the fact that in the period 1992-2000 Serbia and Montenegro was not a Member of the United Nations and, consequently, "did not. . . have access to the Court under either paragraph 1 or paragraph 2 of Article 35 of the Statute" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 327, para. 127), while in the 2007 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* it found, through the form of decision by "necessary implication", that Serbia did have access to the Court (*I.C.J. Reports 2007 (I)*, pp. 98-99, para. 132).

10. In the jurisprudence of the Court, taken as a whole, the cases in which the issue of access was *status versiae et controversiae* are rare because of the practically universal nature of the United Nations and because of the equality sign between the membership in the Organization and the *jus standi* before the Court. Along with the cases in which the

FRY/Serbia was involved, the list of relevant cases included the *Monetary Gold* and *Fisheries* cases. In all these cases the Court followed a uniform pattern in its reasoning. *Exempli causa*, in the *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* case, the Court stated *inter alia*:

> "the Minister for Foreign Affairs of Iceland seemed to suggest that the timing of the declaration of the Federal Republic of Germany of 29 October 1971, deposited with the Registrar on 22 November 1971, may have had some effect on the binding force of the agreement contained in the Exchange of Notes of 19 July 1961 *or on the right of access to the Court of the Federal Republic of Germany*. As to the first point, it is clear that the binding force of the agreement between the two Governments, which is to be examined in the present Judgment, *bears no relation to the date on which the declaration required by the Security Council resolution of 15 October 1946 was deposited with the Registrar: the former is designed to establish the jurisdiction of the Court over a particular kind of dispute; the latter provides for access to the Court of States which are not parties to the Statute. As to the second point (i.e., the question of the Federal Republic's right of access to the Court), according to the Security Council resolution, a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, previously to its appearance before the Court. This was done.*" (*Judgment, I.C.J. Reports 1973*, p. 53, para. 11; emphasis added.)

11. It comes out that in the series of decisions taken by the Court as regards the *jus standi* of the FRY/Serbia, the Judgments on the *Legality of Use of Force* cases are the only ones in conformity with the general jurisprudence of the Court in the matter. In its reasoning part, the Judgment substantiates the basic elements of the *jus standi* as defined by Article 35 of the Statute in terms of an autonomous processual condition of antecedent and mandatory nature distinguishable from jurisdiction of the Court *stricto sensu*. The Court found, *inter alia*, that

> "the question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the present proceedings is fundamental; for if it were not such a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute. In that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seised the Court, whatever title of jurisdiction it might have invoked, for the simple reason that Serbia and Montenegro did not have the right to appear before the Court.
>
> The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdic-

tion upon it." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46; see also pp. 292-293, para. 29.)

12. In addition, the finding that "at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999, the Applicant. . . was not a Member of the United Nations" (*ibid.*, p. 314, para. 91) was, as time has shown, of far-reaching importance. The Court accepted it in the Judgment of 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* and in the present Judgment after more than one decade of wandering between the Scylla of avoiding position, and the Haribda of *sui generis* position, a sort of *tertium quid* between membership and non-membership of the FRY in the United Nations.

13. However, it should be noted that *stricti juris* even the 2004 Judgment is not free from inconsistency. It regards the disharmony between the *dispositif* of the Judgment with its *ratio decidendi*. While the reasoning part of the Judgment is strictly formulated in terms of the right of the FRY to access to the Court under Article 35, paragraphs 1 and 2, of the Statute (*ibid.*, p. 298, paras. 46; pp. 310-311, para. 79; pp. 314-315, para. 91 and p. 327, para. 126), its *dispositif* concerns exclusively the "*jurisdiction* to entertain the claims" (*ibid.*, p. 328, para. 129; emphasis added). The inconsistency between the *dispositif* and the *ratio decidendi* is even greater, because the Court did not deal with the issue of jurisdiction *stricto sensu*, sticking to the basic assumption that it must determine whether the FRY meets the conditions laid down in Article 35 of the Statute before examining the conditions in Articles 36 and 37 of the Statute. Therefore, the Court concluded that the fact that

> "Serbia and Montenegro did not, at the time of the institution of the present proceedings, have access to the Court. . . makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents *to the jurisdiction of the Court*" (*ibid.*, pp. 327-328, para. 127; emphasis added).

14. It appears that the jurisdiction of the Court, in the cases in which the FRY/Serbia was involved as a party, is far from consistent at all three levels of its evaluation. The very fact that the Court, in dealing with an identical issue in the different phases of the same case, or in closely related cases, applied the three basic, mutually exclusive *modus faciendi*, is, if not by itself an answer to the question whether the Court acted in a consistent manner or not, at the very least represents a strong *indiciae* in that regard.

It is difficult to discuss in terms of substantial consistency the decisions of the Court based on the avoiding position. For, the decisions regarding the *jus standi* of the FRY/Serbia, taken *sub silentio*, either by accepting the factual presumptions *(praesumptio facti vel homine)* about the con-

tinuity and legal identity (1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*) or by the constructions which keep them indirectly in force (2007 Judgment in the same case) do not give real answers to the question which is cardinal for the legality of the Court's judicial activity. Decisions based on the substantial assessment of *jus standi*, although in contrast to those based on avoidance, represent the expression of a proper judicial action, are diametrically opposed in the determination of the *jus standi* of the FRY/Serbia. *Indiciae* or elements of the substantial assessment of *jus standi*, since they are not, by themselves, decisions and, moreover, were not an element of the proper decisions on the issue, demonstrate the scope of the inconsistency in the legal reasoning.

15. The conclusion follows that the only consistency of the decisions of the Court regarding *jus standi* of the FRY/Serbia is found in the inconsistency of the decisions *per se* and in its *ratio decidendi*. And, if the purpose of consistency is, *inter alia*, to "provide predictability" (joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 330, para. 3) "in different phases of the same case or with regard to closely related cases" *(ibid.)*, it is not clear what that predictability would consist of in those cases in which the FRY/Serbia was a party, except, perhaps, that the FRY/Serbia has *jus standi* as a respondent, and that it is deprived of it as an applicant.

16. The jurisdiction of the Court regarding the status of the FRY/Serbia as a Contracting Party to the Genocide Convention is seemingly consistent. In the different phases of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* as well as in the provisional measures phase of the *Legality of Use of Force* cases, the Court basically adopted the finding that the FRY/Serbia may be considered as bound by the Genocide Convention on the basis of intention, as expressed in the declaration adopted on 27 April 1992

> "to remain bound by the international treaties to which the former Yugoslavia was party. . . confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17; see also *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 838, para. 32).

The finding acquired, in the merits phase of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the *res indicata* status and is in part reaffirmed in the present Judgment, too (para. 11). So, in terms of horizontal as well as limited vertical consistency, it seems that the Court acted almost *semper idem*. The precedental authority of the finding is, however, in doubt in terms of substantive consistency.

First of all, the qualification of the 1992 declaration as a unilateral legal act capable of producing the proper effects per se, seems to be inconsistent with the relevant rules of international law as expressed in the jurisprudence of the Court (paras. 121-128 below).

Even if *ex hypothesis* the 1992 declaration may be considered as such an act, well-settled rules in the jurisprudence of the Court regarding the interpretation of unilateral acts could hardly lead to the conclusion reached by the Court (para. 132 below).

17. Two additional considerations are of interest also.

Although in the present Judgment as well, the majority reaffirms the *dispositif* of the decisions of the Court adopted in the earlier cases related to the Genocide Convention, its legal reasoning is not consistent in that regard. While in the earlier cases, or its relevant phases, the majority, clearly and unequivocally, gave to the 1992 declaration a constitutive character, the present Judgment considers Serbia a Contracting Party by a combined action of the declaration and some additional, explicit or implicit, considerations (paras. 160-167 below). In that way, the majority perception of the declaration is blurred, for it is not clear enough whether it sees it as a constitutive or declarative act or as a mixture of the two.

18. The jurisdictional treatment of the declaration is different as well. In the earlier cases, the 1992 declaration was treated as a proper basis for the jurisdiction of the Court *ratione personae* (*I.C.J. Reports 1996 (II)*, pp. 610-613, paras. 17-26), while in the present case the 1992 declaration is treated as an issue of jurisdiction *ratione materiae* (Judgment, paras. 93-119).

The position of the Court in the 1996 Judgment was clear and designed in accordance with the standard practice of the Court. The jurisdiction *ratione personae* was determined in terms of whether Bosnia and Herzegovina and the FRY may be considered as parties to the Genocide Convention. Finding that the Parties to the dispute are Contracting Parties to the Genocide Convention — the FRY on the basis of the 1992 declaration (*I.C.J. Reports 1996 (II)*, p. 610, para. 17) and Bosnia and Herzegovina through the mechanism of State succession (*ibid.*, p. 611, para. 20) —, the Court concluded:

> "For the purposes of determining its jurisdiction in this case, the Court has no need to settle the question of what the effects of a situ-

> ation of non-recognition may be on the contractual ties between parties to a multilateral treaty. It need only note that, even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, *all the conditions are now fulfilled to found the jurisdiction of the Court ratione personae*." (*I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added.)

The Court assessed its jurisdiction *ratione materiae* in the following terms:

> "whether there is a dispute between the Parties that falls within the scope of that provision [Art. IX of the Convention].
>
> . . . . . .
>
> *It is jurisdiction ratione materiae*, as so defined, to which Yugoslavia's fifth objection relates." (*Ibid.*, p. 614, para. 27; emphasis added.)

19. In the present Judgment, the majority treats the jurisdiction of the Court *ratione materiae* exclusively as the issue of whether Serbia could be considered a Contracting Party to the Genocide Convention in the relevant period of time (Judgment, paras. 93-119). In its conclusion, the majority finds that:

> "In sum, in the present case the Court, taking into account both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001, considers that it should attribute to those documents precisely the effect that they were, in the view of the Court, intended to have on the face of their terms: namely, that from that date onwards the FRY would be bound by the obligations of a party in respect of all the multilateral conventions to which the SFRY had been a party at the time of its dissolution. . ." (*Ibid.*, para. 117.)

20. A turn in the jurisdictional treatment of the 1992 declaration took place in the majority reasoning in the 2007 Judgment because of the specific needs as regards the construction of the decision by "necessary implication" on the *jus standi* of the FRY in the 1996 Judgment. The dictum reads:

> "In the view of the Court, the express finding in the 1996 Judgment that the Court had jurisdiction in the case *ratione materiae*, on the basis of Article IX of the Genocide Convention, seen in its context, is a finding which is only consistent, in law and logic, with the proposition that, in relation to both parties, it had jurisdiction *ratione personae* in its comprehensive sense, that is to say, that the status of each of them was such to comply with the provisions of the Statute concerning the capacity of States to be parties before the

Court." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 99, para. 133.)

21. Apart from its meaning in terms of judicial consistency, the different treatment of the 1992 declaration seen in this context is highly significant for at least three reasons:

(a) the manner in which the majority reads the relevant earlier decisions;
(b) the majority perception of the *res judicata* effects of the 1996 Judgment; and
(c) the majority perception of the precedental authority of the 1996 Judgment.

22. The judicial consistency is rather the result, the picture of the coherency of the decisions and the reasons making a logical and legal union, based on the proper application of legal rules which should bind any court of law in its judicial activity, and not a matter for itself or by itself. It represents the intrinsic, organic quality of the judicial reasoning in the different phases of a case, or different cases, which regard identical or similar issues. As such, it cannot be built up in terms of *ex post* harmonization of heterogeneous decisions on identical or substantially identical issues. Deliberate actions in that regard may have for result the formal consistency only, which exhausts itself in the strengthening of the formal authority of the court of law.

In a situation where two diametrically opposed decisions existed as regards the issue of *jus standi* — the *Bosnia and Herzegovina* case (2007) and the *Legality of Use of Force* cases (2004) — it seems impossible to achieve the quality of substantive consistency, either legally or logically. Even by using a measure of judicial engineering.

2. What is the possible backing of the inconsistency?

23. It is difficult to explain the heterogeneous decisions of the Court as regards the *jus standi* of the FRY/Serbia by reasonable differences in the legal reasoning, unavoidable in every bigger collegium of judges. They are rather the expression of different views of a proper judicial policy in that regard, for the differences in legal reasoning as such have their limits which were well surpassed in the cases where the FRY/Serbia was involved.

It would seem that Judge Higgins in her separate opinion appended to the Judgment in the *Legality of Use of Force* cases gave succinctly the real explanation of the matter by saying:

"The Court, in purporting to find an *ex post facto* clarification of

> the situation as it was in 1992-2000, *notwithstanding that the General Assembly and Security Council had in all deliberation felt the objectives of the United Nations were best met by legal ambiguity, seems to have ignored that wise dictum.*" (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 342, para. 20; emphasis added.)

24. The explanation given in the separate opinion of Judge Higgins was confirmed in a number of pronouncements of the Court.

In the *Legality of Use of Force* cases (2004) the Court pointed out *expressis verbis* that

> "in its Judgment on Preliminary Objections of 11 July 1996. . . [t]he question of the status of the Federal Republic of Yugoslavia in relation to Article 35 of the Statute *was not raised and the Court saw no reason to examine it*" (*ibid.*, p. 311, para. 82; emphasis added).

In addition, it admitted that:

> "The Court did not commit itself to a definitive position on the issue of the legal status of the Federal Republic of Yugoslavia in relation to the Charter and the Statute in its pronouncements in incidental proceedings, in the cases [one of them being the present one] involving this issue which came before the Court during this anomalous [1992-2000] period." (*Ibid.*, p. 309, para. 74.)

25. This seems to be a perception of the judicial policy of the Court, of which it could not be said that it perfectly fits in the functional parallelism as a governing principle of the relations between the principal political organs of the United Nations, the General Assembly and the Security Council, on the one hand, and the International Court of Justice as its principal judicial organ, on the other, as well as judicial independence and impartiality. It seems rather like an action in concert with the principal political organs, implying that the Court follows the legal ambiguity which "has been anomalous in extreme" (R. Higgins, "The new United Nations and former Yugoslavia", *International Affairs*, Vol. 69, No. 3, July 1993, p. 479).

26. Of special relevance in that regard is the pronouncement of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, made, moreover, in the merits phase, that "in 1999 — and even more so in 1996 — *it was by no means so clear* as the Court found it to be in 2004 that the Respondent was not a Member of the United Nations at the relevant time" (*Judgment, I.C.J. Reports 2007 (I)*, p. 98, para. 131; emphasis added).

(This pronouncement opens a very unpleasant question as to the activity of the Court over a considerable period of time in the light of the principle *bona fidei* which, as a peremptory one, is at least equally valid for the Court as it is for States. If, for more than a decade, it was so clear that the Respondent was not a Member of the United Nations, and the

quality of being a Member of the United Nations was the only basis on which the Respondent could have been considered a party to the Statute of the Court, it follows that the Court deliberately avoided recognizing the jurisdictional fact affecting the very legality of the totality of its actions in the cases in which the FRY/Serbia was involved as a party. Such an attitude of the Court could be termed judicial arbitrariness, close to, or in the zone of, abuse of judicial power rather than judicial caution resulting in judicial indecision. The explicit admission by the Court that "in 1999 — and even more so in 1996 — it was by no means clear . . . that the FRY was not a Member of the United Nations at the relevant time" being, in fact, tantamount to the admission that the Court acted *sine vires*, represents a sufficient and sound basis for revision of the 1996 Judgment *proprio motu*. It would be the proper way of action of the Court in such circumstances to preserve its judicial integrity. For, in the light of international law, the fact that the Court acted *sine vires* automatically deprives the 1996 Judgment of validity, both in formal and in substantive terms. Standing in the way of the application of the law in that regard is only the comfortable position of the Court in the judicial environment of the international community which does not know the appellate procedure or the appellate court.)

27. The action in concert with the political organs of the World Organization was familiar or, even, inherent to the spirit prevailing at the Hague Peace Conference that judicial settlement as such may play the role of an instrument for diminishing the danger of, and, moreover, substitute to the resort of arms. The situation is quite different now. The idea that

> "'an international Court should play an important role in the new Organization of nations for peace and security', is illusory. Indeed, there is evidence, in the records of the various organs of the United Nations, that the Court is regarded as something different from other United Nations organs, and its procedures something independent from customary United Nations procedures." (S. Rosenne, *The Law and Practice of the International Court, 1920-2005,* Vol. I, *The Court and the United Nations*, pp. 189-190; footnote omitted.)

28. In the framework of the United Nations "the International Court of Justice stood as the judicial apex, while the Security Council was the new Praetorian guard for the political consensus and its enforcement" (M. Cohen, "Impartiality, Realism and International Process", *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, p. 96).

So,

> "Much more than the establishment of peace, the development of international law is the essential function of judicial settlement . . . The gradual elaboration of the law through the accumulation *of a*

body of homogeneous decisions is a condition of order and stability." (C. De Visscher, *Theory and Reality in Public International Law*, rev. ed., 1968, p. 390; emphasis added.)

29. The principle of functional parallelism gives to the ICJ an important, substantially broader scope for judicial activity in terms of the impartial determination of disputes on the basis of law. By its very nature the principle runs counter to crypto-political decisions clad in legal garb, which may bring any court of law dangerously close to the well-known *chambres de réunion*. The principle gives each organ involved the possibility to act in its own space, fulfilling its original role, and regards the court that is to declare the law.

30. Deliberate concerted activity with political organs leaves hard consequences on any court of law. Legal reasoning and reasoning based on political considerations and expediency are in unsolvable conflict both in terms of substance and in terms of time. This is clearly demonstrated, as far as judicial consistency is concerned, in the cases before the Court involving the FRY/Serbia as a party.

31. It appears that during some 15 years the Court, in terms of judicial policy, acted in several capacities in the cases in which the FRY/Serbia was involved as a party.

32. Since the institution of proceedings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in 1993, until the admission of the FRY to the United Nations in 2000, the Court, in respect of the jurisdictional issues involved, basically acted as a guardian of the ambiguous policy of the principal political organs of the United Nations in regard to the status of the FRY in the Organization. In the proceedings on the indication of provisional measures of 1993 and in the Judgment on preliminary objections of 1996, it relied tacitly on the factual presumption *(praesumptio facti vel homine)* of the legal identity and continuity of the FRY with the SFRY, acting in concert with the General Assembly as author of the legally vague and controversial resolution 47/1, which allowed *pro et contra* interpretation of the status of the FRY vis-à-vis the United Nations.

33. So, as became clear *tractu temporis*, it choose the weakest possibility in the light of the principle that "[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972*, p. 52, para. 13), especially with respect to the *jus standi* requirement as the principal condition for the legality of the Court's judicial action *in casu*.

The Court had two more, much better, possibilities at its disposal:

(a) to ask for an authentic interpretation of resolution 47/1 from the General Assembly; or

(b) to make its own explicit interim determination of the matter in a proper form.

34. In contrast to the legal presumption *(praesumptio juris et de jure)*, the factual presumption bears an unavoidable limitation in terms of time. In the context of the matter, it was obvious that the factual presumption of continuity of the FRY may be valid only until the moment when the competent political organs of the United Nations adopted the final decision on the status of the FRY/Serbia in the United Nations, unfounded on the continuity premise. That is what happened in November 2000, when, by decision of the competent organs of the United Nations, the FRY was admitted to its membership as a new Member.

35. This fact demonstrated dramatically the ontological irreconcilability of the legal reasoning, on the one side, and the reasoning based on pragmatic considerations and expedience, on the other.

Since the admission to the membership in the United Nations is a matter of exclusive competence of the two principal political organs — the Security Council and the General Assembly — and their decision is binding upon the United Nations structure as a whole, it might be expected from the Court, in the spirit of functional parallelism, to adapt in a proper form its determination of the *jus standi* of the FRY/Serbia to that fact, being, in the circumstances surrounding the case, determinative of its *jus standi*.

The Court, however, opted for a different treatment of the FRY/Serbia in that regard, depending on the cases before it, thus demonstrating not only its inconsistency but throwing a shadow on the application of the fundamental principle of the equality of States before the Court also.

36. In the *Legality of Use of Force* cases the Court designed its determination of the *jus standi* of Serbia/Montenegro in the spirit of the principle of functional parallelism, finding, *inter alia*, that

> "at the time of filing of its Application to institute the present proceedings before the Court on 29 April 1999. . ., Serbia and Montenegro, was not a Member of the United Nations, and, consequently, was not. . . a State party to the Statute of the International Court of Justice" (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 314, para. 91).

So, in the eight *Legality of Use of Force* cases the Court in fact acted as a guardian of legality, both in the formal and in the substantive terms, respecting the division of competences between the principal political organs of the United Nations and the International Court of Justice as expressed in the functional parallelism principle.

37. In its Judgment in the *Bosnia* case (2007) the majority *de facto* stuck to the continuity presumption using technical, legal explanations in

the form of specific interpretation of the *res indicata* rule, relying on the understanding of judicial power in terms of unqualified power, which implies that:

> "Subject only to this possibility of revision, the *applicable principle is* res judicata pro veritate habetur, *that is to say that the findings of a judgment are, for the purposes of the case and between the parties, to be taken as correct, and may not be reopened on the basis of claims that doubt has been thrown on them by subsequent events*." (*I.C.J. Reports 2007 (I)*, p. 93, para. 120; emphasis added.)

38. In that Judgment the Court in fact acted as a guardian of its past decision embodied in the 1996 Judgment. Acting in that way, the Court persisted on its own judicial truth, completely divorced from the reality as established in the United Nations by resolution 55/12 and thus producing a *judicium illusorum*.

In that way the position of the Court took a highly interesting turn. While the 1996 Judgment in the *Bosnia* case was adopted with the purpose of acting in harmony with the principal political organs of the United Nations, the insistence on the validity of the premises on which it was based following the adoption of General Assembly resolution 55/12, brought the Court in harsh disharmony with the whole United Nations structure which implemented the resolution strictly.

As a matter of illustration, the objective meaning of the factual presumption on which the *jus standi* of the FRY/Serbia was based in the 1996 Judgment, and accepted in the 2007 Judgment, is that in the context of the dispute before the Court, the FRY/Serbia was considered, at least tacitly, to have been a Member in the period 1992-2000 as far as the Court and the Applicants are concerned, whereas for the United Nations itself it was not a Member, nor even for the Applicants, in respect of any other matter than the cases before the Court. In addition, in the eyes of the Court, the FRY/Serbia was considered a Member of the United Nations in the *Bosnia* case, and is in the present case, and was considered a non-Member in the eight *Legality of Use of Force* cases.

39. The Judgment in the *Application for Revision* case (*I.C.J. Reports 2003*, p. 7) is specific in this particular context (paras. 7-8 above). It possesses two basic meanings. On the one hand, by the construction of the *sui generis* position of the FRY vis-à-vis the United Nations, the Judgment tended, in essence, to substitute the tacit presumption on the continuity with a substantive ground of *jus standi*. For, by admission of the FRY to the United Nations, the presumption of the continuity became devoid of any substance. On the other hand, articulated well after the admission of the FRY to the United Nations, the *sui generis* construction amounted to a revision of the decision taken by the General Assembly which, being binding and conclusive, cannot be reversed by the Court (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary*

Objections, Judgment, I.C.J. Reports 1963, p. 33). The construction is a demonstration of the late reaction of the Court, for *terminus ad quem* for the Court's interpretation of the substance of General Assembly resolution 47/1, which as such was a part of its judicial function, in terms other than those of resolution 55/12 of 1 November 2000, elapsed by the admission of the FRY to the United Nations as a new Member.

40. In the present Judgment, the majority makes an effort to reconcile the basic premises of the 2004 Judgments and the 2007 Judgment. To that effect, the majority proceeds from the finding contained in the 2004 Judgment that the FRY/Serbia, being a Member of the United Nations from 1 November 2000, cannot be considered a party to the Statute prior to that date (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 310, para. 76). Accordingly, on the date of the institution of the present proceedings it did not possess the right to appear before the Court. However, the majority is not ready to accept the necessary consequences of the fact which it took as the starting point of its legal reasoning, but rather resorts to a broadened interpretation of the so-called *Mavrommatis* rule in an effort to prove that, at a certain point in time, all requirements under Articles 35 and 36 of the Statute for the competence of the Court *in casu* were fulfilled.

However, this is not so, either as regards the date of the institution of the proceedings, a date relevant on the basis of the generally accepted rule, or as regards the date of the rendering of the Judgment allegedly as an exception to the general rule, but it is rather an unspecified date in the period of time between the date of the admission of the FRY to United Nations membership — on 1 November 2000 — and the date when the FRY, as a new, successor State, expressed its consent to be bound by the Genocide Convention in the form of accession — on 6 March 2001.

41. Two basic inconsistencies exist in this regard.

First, it transpired that, in the same period of time, the FRY/Serbia, at least as regards its status as a Contracting Party to the Genocide Convention, was both a continuator and a successor State. The present Judgment, true *implicite*, treats the FRY/Serbia as a continuator State as regards the Genocide Convention until 12 March 2001, because it considers it bound by the provisions of the Convention until that date on the basis of the 1992 declaration adopted on behalf of the State "continuing the state, international legal and political personality of the SFRY" (para. 1 of the declaration). From 12 March 2001 *pro futuro*, the FRY/Serbia is a successor State which, acting upon the reminder of the Secretary-General (paras. 176-177 below) expressed its consent to be bound by the Genocide Convention.

Second, if, *arguendo*, it is accepted that the majority interpretation of the *Mavrommatis* rule is correct, the relevant date for assessment as to

whether the necessary requirements for the competence of the Court are met, should be the date of the rendering of the Judgment. This seems to transpire clearly from the *Mavrommatis* Judgment:

> "Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would *now* be covered by the subsequent deposit of the necessary ratifications." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; emphasis added.)

42. In its 1996 Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court stated *inter alia*:

> "even if it were to be assumed that the Genocide Convention did not enter into force between the Parties until the signature of the Dayton-Paris Agreement, all the conditions are *now* fulfilled to found the jurisdiction of the Court" (*I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added).

And, it seems obvious that on that date the requirement under Article 36, paragraph 1, of the Statute was not fulfilled as regards the basis of the jurisdiction of the Court, because the FRY, when acceding to the Genocide Convention, expressed its reservation regarding Article IX of the Convention.

43. It appears that the idea underlying functional parallelism — each has its own — is the most appropriate and productive as regards the Court, in an uninstitutionalized, eminently political community. As the Court stated in the *Nicaragua* case:

> "The [Security] Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs *can therefore perform their separate but complementary functions with respect to the same events*." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95; emphasis added.)

In such society, the assurance of the autonomy of the Court from the political organs is the crucial element of its judicial integrity. The cases in which the FRY/Serbia was involved as a party demonstrate that the judicial consistency, and especially the proper exercise of judicial power as its substance and determinative, should be best safeguarded by objective rules as a guide in determining the applicable law. This principle, which is axiomatic, should be followed in particular by international courts and tribunals, pursuing their activities in a judicial environment that knows no appellate court or procedure.

44. In sum, it appears that the jurisprudence of the Court, as regards the issue of *jus standi* of the FRY/Serbia as well as its status as Contracting Party to the Genocide Convention, not only is not consistent, but there are also departures from earlier decisions, often *sub silentio*, with-

out adducing reasons for departing or, at least, without clear and convincing reasons.

45. The legal ambiguity which the political organs of the United Nations abided by from the beginning to the very end of the Yugoslav crisis may be understandable from the standpoint of pragmatic political considerations and expediency, but not from the standpoint of judicial consideration of the matter. (For instance, recognition of the legal identity and continuity of the FRY with the SFRY, for which there existed strong legal reasons, would automatically open the question of legality, both in its formal and in its substantive terms of the actions and omissions vis-à-vis that State from the very beginning of the Yugoslav crisis.)

3. Nature of the issue of jurisdiction

46. In a number of points, the majority justifies the failure of the Court to deal properly, in its earlier decisions, with specific jurisdictional issues pertaining both to jurisdiction *lato sensu* and *stricto sensu* properly, by referring to the absence of the party or parties concerned. *Exempli causa*, it is stated that "[w]hile at the time objection was taken to the claim of the FRY to be the continuator of the SFRY, *it was not then suggested that that claim was not advanced by the appropriate representative body of the FRY*" (Judgment, para. 107; emphasis added). Or, that "the FRY, while questioning whether the applicant State was a party to the Genocide Convention at the relevant dates, *did not challenge the claim that it was itself a party*" (*ibid*., para. 114; emphasis added; see also para. 115). This is surprising in the light of the importance of the issue of jurisdiction, especially jurisdiction *lato sensu*, and its legal nature as well.

47. In view of the fact that "the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself", the dispute of the parties regarding the jurisdiction in the preliminary objection phase is not a necessary condition for the Court to address the issue of jurisdiction. (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37; see also the individual opinion of President McNair in the jurisdiction phase of the case concerning *Anglo-Iranian Oil Co.* in which he stated that "[a]n international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 116).)

48. Preliminary objections raised by a party are only a tool, a procedurally designed weapon, for the establishment of the jurisdiction of the Court, *suo nomine et suo vigore*, for it is under an obligation to do so ex officio. The legal meaning of the proceedings on preliminary objections

has been defined by the Court in the case concerning *Rights of Minorities in Upper Silesia (Minority Schools)* (hereinafter referred to as *"Minority Schools"*) as follows:

> "the raising of an objection by one Party merely draws the attention of the Court to an objection to the jurisdiction which it must *ex officio consider*" (*Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 23; emphasis added).

Or, as stated by the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*:

> "The Court must, in each case submitted to it, verify whether it has jurisdiction to deal with the case . . . and such objections as are raised by the Respondent may *be useful to clarify* the legal situation." (*Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 622, para. 46; emphasis added.)

Accordingly, the jurisdiction established by the Court *in casu* is not necessarily linked with the dispute as to jurisdiction. If the duty of the Court to verify its jurisdiction in each particular case exists regardless of the preliminary objection as such, then the pleadings of the parties in the proceedings are not *a fortiori* of decisive importance in that sense.

49. The dictum of the Court in the case concerning *Appeal Relating to the Jurisdiction of the ICAO Council* (hereinafter referred to as *"ICAO Council"*) could represent a synthesis of that practice: "[t]he Court must however always be satisfied that it has jurisdiction, and must if necessary go into that matter *proprio motu*" (*Judgment, I.C.J. Reports 1972*, p. 52, para. 13). This is also reflected in the opinions of Judges. (In the case concerning *Mavrommatis Palestine Concessions*, Judge Moore, in his dissenting opinion, stated that "even though the Parties be silent, the tribunal, if it finds that competence is lacking, is bound of its own motion to dismiss the case" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 58); in the *Minority Schools* case, Judge Huber, in his dissenting opinion, found that the Court "must *ex officio* ascertain on what legal foundation it is to base its judgment upon the claims of the Parties" (*Judgment No. 12, 1928, P.C.I.J., Series A, No. 15*, p. 54); and in the case concerning *Free Zones of Upper Savoy and the District of Gex*, Judge Kellogg pointed out in his observations attached to the Order of 6 December 1930 that it was not necessary that the question of jurisdiction be raised by one of the parties, since "[i]t may and should be raised by the Court on its own initiative, as was done in the Eastern Carelia case" (*Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 43).)

50. The question of the jurisdiction of the Court bears two dominant features: *(a)* the question of jurisdiction of the Court is a *questio juris*; and *(b)* the question of jurisdiction of the Court is a matter of international public order.

51. As a *questio juris*[2] the jurisdiction of the Court is within the scope of the principle *jura novit curia*. In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder* (hereinafter referred to as *"River Oder"*) the Polish Government did not contend that the Barcelona Convention had not been ratified by Poland until the oral proceedings. The six respondents asked the Court to reject the Polish contention *a limine*, for having been submitted at such an advanced stage of the proceedings. The Court dismissed the objection as untenable for "[t]he fact that Poland has not ratified the Barcelona Convention not being contested, it is evident that the matter is purely one of law such as the Court. . . should examine *ex officio*" (*Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 19).

52. Being bound by law, the Court is not bound by the arguments of the parties. This follows clearly from the principle *jura novit curia* addressed by the Court in its Judgments in the cases concerning *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)*:

> "The Court. . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, *as in any other case*, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. . . for the law lies within the judicial knowledge of the Court." (*Merits, Judgment, I.C.J. Reports 1974*, p. 9, para. 17; *ibid.*, p. 181, para. 18; emphasis added.)

The principle has also been confirmed in the *Nicaragua* case by a dictum that

> "[f]or the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law (cf. *"Lotus", P.C.I.J., Series A, No. 10*, p. 31)" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 24, para. 29).

53. Consequently, the rule according to which a party seeking to assert

[2] "The existence of jurisdiction of the Court in a given case is ... not a question of fact, but a question of law to be resolved in the light of the relevant facts." (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 76, para. 16.) The question of the Court's jurisdiction is "necessarily an antecedent and independent one — an objective question of law — which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party — or both Parties" (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 54, para. 16 *(c)*).

a fact must bear the burden of proving that it "has no relevance for the establishment of the Court's jurisdiction" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37).

The disposition of the parties, although being the dominant principle in the proceedings before the Court, suffers limitations. These limitations derive from the objective rules of the Statute and the Rules of Court defining the nature and limits of the Court's judicial action. As constitutional norms (R. Monaco, "Observations sur la hierarchie des sources du droit international", *Festschrift für Hermann Mosler*, 1983, pp. 607-608) or as *règles préceptives* (intervention of Judge M. Yovanovitch, Preliminary Session of the Court, *P.C.I.J., Series D, No. 2*, p. 59), these rules transcend the disposition of the parties and pertain to the international public order.

54. As a matter of international public order superior to the will of the parties, the question of jurisdiction need not necessarily be raised by the parties themselves but the Court can and should examine it ex officio. (Cf. *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, pp. 18-19; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 7, para. 12; p. 54, para. 13; *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 15; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 32.)

55. In the practice of the Court the expressions ex officio and *proprio motu* are used as interchangeable, although there exist differences in the meaning of these two expressions. The expression *proprio motu* implies the discretionary authority of the Court to take action on its own initiative. The action taken by the Court ex officio is an expression of the duty of the Court by virtue of its judicial function. The exclusion of the discretion of the Court relates to the action itself and does not touch upon the freedom of the Court in respect of the ruling.

The linking element of these two expressions is of a negative nature and is reflected in the fact that it is about the actions which the Court takes, or may take, irrespective of the will and the processual actions of the parties.

The genuine difference in the meaning of these two expressions is overcome in some *dicta* of the Court, by adding the qualification "must" to the expression *"proprio motu"* as in, for example, the Court's Judgment in the *ICAO Council* case (*I.C.J. Reports 1972*, p. 52, para. 13). Thus, in fact, the Court's own motion is qualified as the obligation and the action *proprio motu* deprives it of discretion and turns it into action ex officio.

56. As *questio juris* pertaining to the public order, jurisdiction is determined by the decision of the Court, formal or informal, on the basis of the principle of *compétence de la compétence*. The principle of *com-*

pétence de la compétence possesses two meanings in that regard: a narrow and a broad one. As such the principle is confirmed in the Court's jurisprudence. In the *Nottebohm* case, the Court stated *inter alia*:

> "Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration.
>
> . . . . . .
>
> Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its own jurisdiction in the present case. *But even if this were not the case, the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it'* (Article 38, paragraph 1, of the Statute), *should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.*" (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, pp. 119-120; emphasis added.)

57. The Court exercises its inherent power from the institution of the proceedings until its end with a view to establishing whether or not it possesses jurisdiction in the particular case. (In reality, the Court proceeds to exercise its inherent power in two ways: *(a)* by ascertaining the existence of processual requirements for jurisdiction through prima facie assessment, being substantively a judicial presumption of jurisdiction or *(b)* by adopting a formal decision on the jurisdiction. In that sense, the power of the Court to determine whether it has jurisdiction in a given case seems absolute, considering that the Court, even when declaring that it has no jurisdiction *in casu*, exercises that inherent power.)

58. Without the operation of the principle of *compétence de la compétence* in its broad meaning as a principle of general international law, it would be impossible to establish the competence of the Court to indicate provisional measures, for the objections to the Court's jurisdiction, pursuant to Article 79 of the Rules, may be submitted by the respondent within the time-limit fixed for the delivery of the Counter-Memorial and by a party other than the respondent within the time-limit fixed for the delivery of the first pleading. The operation of the principle in this case results in the judicial presumption on proper jurisdiction of the Court in the form of "prima facie jurisdiction".

59. The understanding that action by the party is a condition necessary for the Court to deal properly with jurisdictional issues appears to be erroneous. It relies on the equalization of the merits and the jurisdictional part of the proceedings before the Court. Equalization of these two parts of the proceedings is conducive to the treatment of the question of jurisdiction as *questio facti* and as a matter *inter partes*, which is in discord with its true nature.

The rule according to which "the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58), is valid in the merits phase of a case, but is not equally valid in the jurisdictional phase of the proceedings. The application of the rule in the jurisdictional phase is resisted by the very nature of the question of jurisdiction, running counter to the inherent right and duty of the Court to determine its jurisdiction.

II. Specific Issues *In Casu*

1. Jus standi *of the Respondent*

(a) *General approach of the majority to the* jus standi *requirement*

60. The general approach of the majority to the *jus standi* requirement does not seem clear and precise either as regards its substance or as regards the terminology used. The majority is ambivalent as regards the preliminary question whether the *jus standi* requirement is an autonomous one.

Jus standi in the Judgment is seen as:

(a) "either as an issue relating to the Court's jurisdiction *ratione personae* or as an issue preliminary to the examination of jurisdiction" (Judgment, para. 66);

(b) "the question of access is clearly distinct from those relating to the examination of jurisdiction in the narrow sense" (*ibid.*, para. 87);

61. These qualifications are not only imprecise but are also contradictory. For, if access to the Court is understood as jurisdiction *ratione personae*, it is unclear how it can be "an issue preliminary to the examination of jurisdiction" or "clearly distinct from those relating to . . . jurisdiction in the narrow sense", if jurisdiction *ratione personae* is, in fact, a part of the jurisdiction. If, on the contrary, it is an issue preliminary to jurisdiction in the narrow sense, it is, *mutatis mutandi*, equally unclear. Besides, the qualifications are indirect, offered primarily with the intention of determining the relation between *jus standi* and jurisdiction of the Court.

62. It is true that in descriptive terms every jurisdiction over *personae*, be it natural or legal persons, is jurisdiction *ratione personae*. But, a descriptive meaning of the expression is one thing and the legal meaning as *technicus terminus* is quite another thing.

Jurisdiction *ratione personae* concerns the issue whether the party to the dispute is bound by a jurisdictional instrument serving as a basis of jurisdiction as usually understood. As such, it is not a matter that falls within the ambit of Article 35 but rather of Article 36 of the Statute.

The equalizing of these two terms — jurisdiction *ratione personae* and

jus standi — applied in the merits phase in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, should be treated as an incident dictated by the substance of an *ad hoc* construction of the decision by necessary implication (*I.C.J. Reports 2007 (I)*, separate opinion of Judge *ad hoc* Kreća, pp. 485-489, paras. 40-43).

63. If one deems it necessary to find a proper solution to the terms used, within the frame of jurisdiction *ratione personae,* then, if it relates to the requirement of *jus standi* also, it would be termed as "jurisdiction *ratione personae lato sensu*", combining the descriptive and technical meaning of the term. *A contrario*, a measure of confusion is inevitable, since the jurisdiction of the Court is "a unitary concept, and the use by the Court and elsewhere of terms such as jurisdiction *ratione personae*, *ratione materiae* or the scope of the jurisdiction *ratione temporis* is solely for purposes of systematic presentation" (S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II, *Jurisdiction*, p. 526).

64. The majority had no intention, it seems, of dealing in more detail with the substance of the *jus standi* requirement, finding that it is a matter of "debate" (Judgment, para. 66), tending to suggest its theoretical nature. Any issue, however, can, and often must, be treated as a theoretical one, concerned with knowledge as, *exempli causa*, is shown by the extensive discourse in the Judgment about the objection to the admissibility and to the jurisdiction of the Court (*ibid.*, para. 120). The more so, since the experience with respect to the Court, at least its part relating to cases in which the FRY/Serbia was involved, could hardly be accepted as satisfactory.

In essence, the discourse about the *jus standi* requirement in the present case, taking into consideration all the circumstances concomitant to its application, is in fact a discourse about the nature and scope of Article 35 of the Statute.

65. The situation is confusing also as regards the terms used in order to determine the requirement under Article 35 of the Statute. The expressions "access to the Court" (*ibid.*, paras. 64, 67, 87), "capacity to participate in the proceedings" (*ibid.*, paras. 69, 87), "capacity to be a party to the proceedings" (*ibid.*, table of contents, para. 57), "right to access (*ibid.*, para. 67), "properly appear before the Court" (*ibid.*, para. 68) are used interchangeably.

66. More expressions, more confusion. The expression "access to the Court" corresponds by its meaning to the general term *jus standi in indicio* as the right of a person to appear or to be heard in such-and-such proceedings (*Jowitt's Dictionary of English Law*, 2nd ed., Vol. 2, p. 1115). This, however, could not be said for the expression used in the Judgment — "capacity to participate in the proceedings" — which has a broader meaning. It includes, for instance, also the capacity to participate in the proceedings on the basis of legal interests of the party which, otherwise, has access to the Court.

Exempli causa, in the case concerning *Barcelona Traction, Light and Power Company, Limited*, the Court used it to denote the right of "a government to protect the interests of shareholders as such" which was in effect the matter of legal interest independent of the right of Belgium to appear before the Court (*Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 45). On the contrary, in the *South West Africa* case the Court has drawn a clear distinction between "standing before the Court itself", i.e., *locus standi*, and "standing in the. . . phase of. . . proceedings" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 18, para. 4).

67. In addition to the expression "access to the Court", also appropriate seem the expressions "right to appear", "*jus standi* before the Court", or "entitled to appear before the Court", because they have been designed in terms of the right or entitlement of a State and, as such, correspond with the general provision of Article 35 providing that "the Court shall be open", implying a subjective right of a State party to the Statute. (Furthermore, other expressions are used, such as, for example, *"locus standi in judicio ratione personae"* — S. Rosenne, *op. cit.*, Vol. II, *Jurisdiction*, p. 913. It appears however, that this expression is less appropriate. It is partly a pleonasm, because *locus standi in indicio* is *per definitionem* related to *personae*; it seems also too extensive because, by suggesting that there also exists *locus standi in indicio ratione materiae*, it may concern also a legal interest of the party to the dispute.)

(b) *Nature and characteristics of the* jus standi *requirement*

68. The totality of the requirements for the competence of the Court is given in Articles 34, 35 and 36 of the Statute. The requirements are not, however, of the same nature, having in mind that they express two dominant, but distinct features of the International Court of Justice as a court of law — its character of a partly open court and consensual basis of jurisdiction.

As stated by the Court in the provisional measures phase in the ten *Legality of Use of Force* cases:

> "the Court can. . . exercise jurisdiction only between States parties to a dispute *who not only have access to the Court but also have accepted the jurisdiction of the Court*, either in general form or for the individual dispute concerned" (*(Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 132, para. 20).

69. Whereas Article 36 of the Statute is concerned with the consensual basis of the jurisdiction of the Court, embracing instruments serving as its basis, Articles 34 and 35 are concerned with access to the Court. All three Articles have their place in the Statute in the part under the heading

"Competence of the Court". As in the practice of the Court the words "jurisdiction" and "competence" are used interchangeably, the difference between "access to the Court" and "jurisdiction of the Court" may be diluted or even lost. Therefore, it seems appropriate to make, in this part as well, the corresponding terminological requirements under Article 36 of the Statute and in terms of jurisdiction/competence *lato sensu* in the sense of requirements under Articles 34 and 35 of the Statute. Or, special and general jurisdiction/competence, respectively.

70. The right to appear before the International Court of Justice is a limited right, due to the fact that it is not a fully open court of law. The limitations exist in two respects. First, the right is reserved for States (Statute, Art. 34, para. 1). Consequently, it does not belong to other juridical persons or physical persons. Second, as far as States are concerned, only States parties to the Statute of the Court possess the right referred to, being as Member of the United Nations *ipso facto* parties to the Statute of the Court or by accepting conditions pursuant to Article 35, paragraph 2, of the Statute. States non-parties to the Statute can acquire this right on condition that they accept the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946).

71. The common element underpinning these two notions is that they represent processual conditions on whose existence is dependent the validity of the actual proceedings before the Court; both with respect to incidental proceedings and the merits, and with respect to the bringing of the dispute to the Court's decision in the proceedings. And there the common ground between the two notions essentially ends and room for differences emerges.

72. Both notions, *jus standi* and jurisdiction *ratione personae*, share the characteristic of belonging to the *corpus* of processual conditions, necessary for the validity of proceedings before the Court, whether incidental or on the merits, and with respect to the reference of disputes to the Court for decision. They also share the attribute of being absolute processual conditions that must be satisfied in every case and both are positive requirements in that, if they are not satisfied, the Court cannot entertain the claims made.

73. The differences between them, however, are considerably greater, making them distinct processual conditions:

— they reflect the different aspects of the legal nature of the Court. While jurisdiction *ratione personae*, as one of the relevant aspects of jurisdiction, expresses the consensual nature of the Court's jurisdiction, *jus standi* derives from the fact that the International Court of Justice, in contrast to arbitration courts, is not a fully open court of law. Access to the Court is limited in two respects on the basis of Article 34, paragraph 1, and Article 35, paragraphs 1 and 2, of the Statute of the Court.
— although both jurisdiction *ratione personae* and *jus standi* are regulated by the rules of the Statute having an objective, constitutional

character, there exists a fundamental difference in the application of these rules. The rules of the Statute which concern *jus standi* are applied by the Court *ex lege*, while the corresponding rules concerning jurisdiction *ratione personae* are applied on the basis of the consent of States to the dispute. In its Judgments in the *Legality of Use of Force* cases, the Court stated, *inter alia*, that "a question of jurisdiction . . . relates to the consent of a party and the question of the right of a party to appear before the Court under the requirements of the Statute, which is not a matter of consent" (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36). Therefore, it can be said that in substance the jurisdiction of the Court is governed by the law in force between the parties, while *jus standi* is governed by the objective rules of the Statute as such.

— the differing natures of *jus standi*, on the one hand, and jurisdiction *ratione personae*, on the other, generate corresponding legal consequences in the proceedings. A lack of *jus standi* possesses an automatic effect, since, as a rule, it cannot be overcome in the proceedings before the Court, while a lack of jurisdiction *ratione personae* is surmountable as the parties may either confer jurisdiction upon the Court in the course of the proceedings or perfect it for instance, by express agreement or by *forum prorogatum*. As a consequence, in contrast to a lack of *jus standi*, the absence of jurisdiction *ratione personae* does not preclude valid seisin of the Court (paragraph 106 below).

74. The competence or special jurisdiction in the particular case of the International Court of Justice, as a semi-open court of law with jurisdiction based on consent of the parties to a dispute, implies twofold consent by States:

(a) consent that the Court is "an organ instituted for the purpose *jus dicere*" (*Corfu Channel (United Kingdom* v. *Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948*; dissenting opinion of Dr. Daxner, p. 39). This consent is expressed indirectly, through membership of the United Nations, or directly, in the case of a non-Member of the United Nations either by adhering to the Statute of the Court or by accepting the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946), as a preliminary condition; and

(b) consent that the Court is competent to deal with the particular dispute or type of dispute which is given through the relevant jurisdictional bases under Article 36 of the Statute, as a substantive but qualified condition.

(c) *Majority's decision-making framework*

75. The starting-point of the majority reasoning consists of two obser-

vations "which are not disputed by the Parties" (Judgment, para. 74).

According to the first observation,

> "in its Judgments in 2004 in the *Legality of Use of Force* cases, the Court clearly determined the legal status of the FRY, now Serbia, over the period from the dissolution of the former SFRY to the admission of the FRY to the United Nations on 1 November 2000" (*ibid.*, para. 75),

in terms that the Respondent was not a Member of the United Nations prior to 1 November 2000, nor that it was a party to the Statute of the Court.

The second observation is that

> "from 1 November 2000 and up to the date of the present Judgment, the Respondent is a party to the Statute by virtue of its status as a Member of the United Nations, that is to say pursuant to Article 93, paragraph 1, of the Charter, which automatically grants to all Members of the Organization the status of party to the Statute of the Court" (*ibid.*, para. 77).

These observations, in fact *premissae minor* in the majority reasoning, are different by their nature and effects in the framework of the present case.

76. The legal status of the FRY/Serbia in the United Nations, being in the circumstances surrounding the present case the determinative of its *jus standi*, is the jurisdictional fact *per se*. For the membership in the United Nations is the only basis upon which the Court might be open to the FRY/Serbia, since it did not accept the conditions pursuant to Article 35, paragraph 1, of the Statute nor the general jurisdiction of the Court in conformity with Security Council resolution 9 (1946).

On the other hand, the fact that from 1 November 2000 the FRY/Serbia has been a new Member of the United Nations is, by itself, deprived of jurisdictional significance *in casu*, in the light of the rule that "the jurisdiction of the Court must normally be assessed *on the date of the filing of the act instituting proceedings*" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26; emphasis added; see also *I.C.J. Reports 1998*, p. 26, para. 44) on the one side, and the fact that Croatia submitted its Application on 2 July 1999, a date well before the admission of the FRY to the United Nations, on the other.

77. The reconciliation of these two observations, being *premissae minor* in the majority reasoning *in casu,* implies therefore the establishment of an exception to the general rule. An exception that in the frame of the judicial syllogism represents *premissae maior*, which the majority tries to find in the so-called *Mavrommatis* rule.

(d) *The* Mavrommatis *rule, as a purported legal basis for reconciliation*

78. In its Judgment in the *Mavrommatis* case, the Permanent Court of International Justice stated, *inter alia*, that:

> "it must. . . be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII [annexed to the Treaty of Lausanne] had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II [of the Mandate for Palestine] was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34.)

79. The Court's dictum is interpreted by counsel for Croatia in the following terms:

> "all the substantive requirements for the Court's jurisdiction were united, at the latest when the Respondent was admitted to the United Nations on 1 November 2000. There was a case duly filed before the Court by Croatia, so there was *seisin*. The Respondent was at relevant times a party to the Genocide Convention, so there was an apparent *basis of claim*. The Respondent was a State which had in force an unqualified consent to jurisdiction under the Genocide Convention, so *there was consent to jurisdiction.* The Respondent was, at least as from 1 November 2000, a party to the Court's Statute, so there was *access to the Court.* One: seisin; two: basis of claim; three: consent to jurisdiction; four: access to the Court. Who could say there is a fifth requirement for you to hear a case? The *Mavrommatis* principle is the principle that provided these four substantial elements are united at any given time, the order in which this occurred is a pure matter of form and does not affect. . . jurisdiction." (CR 2008/11, pp. 33-34, para. 8 (Crawford).)

(e) *The substantial incapability of the* Mavrommatis *rule to produce the desired effects* in casu

80. It seems clear that the so-called *Mavrommatis* rule constitutes an exception to the general rule that the jurisdiction of the Court must be assessed on the date of the filing of the act instituting proceedings. That fact, however, does not solve the problem posed *in casu*. (Even the *Mavrommatis* rule by itself, inspired basically by reservations made in many arbitration treaties, seems too broad in the light of the subsequent jurisprudence of the Court. The ratification of a treaty is not regarded now as a matter of form but rather as a matter of substance. In the *Ambatielos* case, the Court found, *inter alia*, as regards the retroactive effects of the Treaty of 1926, that:

> "Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier." (*Ambatielos (Greece* v. *United Kingdom), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 40.)

The word "form" used in the *Mavrommatis* dictum should perhaps be understood as "formalities", for the simple reason that in any judicial proceedings as a formal one, including the proceedings before the Court, the form as such plays a prominent and, as regards some issues, even a decisive role. As a matter of illustration, an application could not be submitted to the Court in an oral form.)

In the light of the relevant circumstances of the present case, the true question is: what is the scope of the exception established by the *Mavrommatis* Judgment. Is it a general exception applicable to any jurisdictional defect, or a special exception applicable to certain *species* of jurisdictional defects?

81. The so-called *Mavrommatis* rule is based on a couple of constitutive elements:

(i) the existence of a procedural defect in the instrument serving as the basis of jurisdiction on the date of institution of the proceedings;
(ii) the defect is of such kind that it may be cured by a proper action of the applicant as a rule (in principle, however, the possibility that the defect is overcome by an action of the respondent, if a willing litigant, can not be *a priori* excluded); and,
(iii) the perfectuated instrument produces a retroactive effect, since, as the Court observed, it would make no sense to require an applicant to "institute fresh proceedings . . . which it would be fully entitled to do" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction*

and Admissibility, Judgment, I.C.J. Reports 1984, pp. 428-429, para. 83).

82. It appears that in the *Mavrommatis* Judgment, as well as in other Judgments, such as *Certain German Interests in Polish Upper Silesia* (*Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14) and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 428-429, para. 83), based on its precedental authority, the real issue in question was the existence of procedural defects in terms of defects in jurisdictional instruments as contemplated by Article 36 of the Statute. Jurisdictional instruments as such have as their object the competence of the Court to deal with the particular dispute or type of disputes, not the right of judicial protection before the Court. As those instruments are based on the consent of the parties it is natural that they can be cured by a proper action of the applicant or even the respondent, if it is a willing litigant.

83. But, "the right of a party to appear before the Court. . . is not a matter of consent" (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 295, para. 36). Since the *jus standi* requirement belongs to *corpus juris cogentis*[3], its defect in *jus standi* can not be cured upon the institution of proceedings.

Consequently, a defect in *jus standi* is not a matter of form (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34) or "a mere defect of form, the removal of which depends solely on the Party concerned" (*Certain German Interests in Polish Upper Silesia*, *Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14).

84. The nature of *jus standi* determines the date of assessment of its fulfilment. As an objective requirement relating to the limits of the judicial activity of the Court, *jus standi* must be assessed as soon as possible, i.e., on the date of the institution of proceedings. (In that regard, strictly and without exception, the Court has treated the issue in eight *Legality of Use of Force* cases (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment*, *I.C.J. Reports 2004 (I)*, pp. 298-299, paras. 46; pp. 310-311, para. 79; pp. 314-315, para. 91 and p. 327, para. 126).)

In the absence of *jus standi* of a party, the proceedings before the Court are, as matter of law, devoid of substance as demonstrated in the *Legality of Use of Force* cases:

"The conclusion which the Court has reached, that Serbia and

[3] G. Schwarzenberger, "International Law as Applied by International Courts and Tribunals", *International Judicial Law*, Vol. IV, 1986, pp. 434-435; Faclere, *The Permanent Court of International Justice*, 1932, p. 63; R. Kolb, *Théorie du ius cogens international, Essai de relecture du concept*, 2001, pp. 344-348.

> Montenegro did not, at the time of the institution of the present proceedings, have access to the Court. . . *makes it unnecessary for the Court to consider the other preliminary objections filed by the Respondents to the jurisdiction of the Court. . .*" (*Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 327-328, para. 127; emphasis added.)

85. The theory about the uniting of all the requirements for the Court's jurisdiction at any given time has certain, but strictly limited, merits.

It is applicable, in principle, to the requirements regarding the jurisdiction *stricto sensu* in all its aspects — *ratione materiae*, *personae* et *temporis* — but not to the requirement of *jus standi.* The requirement of *jus standi* is not just a fundamental one, but at the same time of antecedent and pre-preliminary nature. "The Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only *those States which have access to the Court can confer jurisdiction upon it.*" (Ibid., p. 299*,* para. 46; emphasis added.)

86. Such a nature of the *jus standi* requirement affects the temporal order of the fulfilment of the requirements regarding the jurisdiction *lato sensu*. It could be said that the *jus standi* requirement is, in terms of time, not only antecedent but, in that sense, also immovable, related to the date of the institution of the proceedings, and that other requirements provided accumulate around it as a kind of linchpin. In its Judgment in the *Fisheries Jurisdiction* case the Court stated in explicit terms: "a declaration, which may be either particular or general, must be filed by the State which is not a party to the Statute, *previously to its appearance before the Court*" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 53, para. 11; emphasis added; see also eight *Legality of Use of Force* cases *(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46).

Otherwise, pursuing the logic on which the majority's understanding of the *Mavrommatis* principle is based, it would be possible to imagine a situation of the Court having pronounced itself competent in the *Aerial Incident* case, after Bulgaria's admission to membership in the United Nation, since "the Statute of the present Court could not lay any obligation upon Bulgaria before its admission to the United Nations" (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Judgment, I.C.J. Reports 1959*, p. 143).

87. Such a temporal order seems not only reasonable, but unavoidable, as well. As a general, potential right of a State, *jus standi* belongs to a State if the State is not a party to the dispute or a party to the proceedings before the Court. It is transformed into an active, effective right under the additional proviso of the existence of a proper jurisdictional instrument.

It is also supported by the order of the relevant Articles of the Statute — Article 35, regarding *jus standi* precedes Article 36, regarding jurisdiction *stricto sensu*. The order of the enumeration of the relevant requirements may represent *per se* an indication of hierarchy or order of priority.

88. Bearing in mind the fundamental nature of the *jus standi* requirement, such a temporal order is rather a matter of substance than a matter of form. In such circumstances the theory of uniting, in an indefinite period of time, the relevant requirements for the competence of the Court looks, as a matter of law, like a judicial "Waiting for Godot".

(f) *Sound administration of justice as a purported basis for the establishment of the desired exception to the general rule*

89. It appears that the majority itself did not accept the *Mavrommatis* rule as applicable to the *jus standi* requirement. It is loyally observed that the *Mavrommatis* rule as well as the jurisprudence of the Court based on it relate to "jurisdiction *ratione materiae* or *ratione personae* in the narrow sense and not to the question of access to the Court, which has to do with a party's capacity to participate in any proceedings whatever before the Court" (Judgment, para. 86).

The majority in fact tries to introduce an exception to the rule that the existence of *jus standi* of a party should be assessed on the date of the institution of the proceedings on the principles underpinning the *Mavrommatis* rule. According to this view:

> "That being so, it is not apparent why the arguments based on the sound administration of justice which underpin the *Mavrommatis* case jurisprudence cannot also have a bearing in a case such as the present one. It would not be in the interests of justice to oblige the Applicant, if it wishes to pursue its claims, to initiate fresh proceedings. In this respect it is of no importance which condition was unmet at the date the proceedings were instituted, and thereby prevented the Court at that time from exercising its jurisdiction, once it has been fulfilled subsequently." (*Ibid.*, para. 87.)

90. Is it questionable whether the principle of sound administration of justice directly underpins the jurisprudence of the *Mavrommatis* case? If we interpret the terms used in the relevant part of the Judgment in the *Mavrommatis* case, in accordance with its ordinary and natural meaning, it seems that the principle of judicial economy, and not the principle of sound administration, underpins the Court's reasoning. For, *ratio decidendi* lies in the words:

> "Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article II [of the mandate for Palestine] was not yet effective, *it would always have been possible for the applicant to re-submit his application in the same*

> *terms after the coming into force of the Treaty of Lausanne*, and in that case, the argument in question could not have been advanced." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34; emphasis added; see also the *Polish Upper Silesia* case, *Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.)

And it would mean going much too far, if the principle of judicial economy would overcome the requirements which makes the core of the legality of proceedings before the Court.

91. The principle of sound administration of justice is obviously not omnipotent nor a law-creating principle. It is rather a standard which allows the Court, in the limits of *discretio legalis*, to mitigate the rigid application of the rule of procedure or to solve an issue of procedure which is not regulated by specific rules of the Statute of the Court and its Rules. In that sense it is designed in the jurisprudence of the Court[4]. As such, it can not serve as a basis for the establishment of exception to the general rule as regards the requirement of *jus standi* for a number of reasons.

First of all, the requirement of *jus standi* is of a mandatory, constitutional nature. Article 35 of the Statute is part of its Chapter II (Competence of the Court) and not of Chapter III (Procedure) which is the natural operating space of the principle of sound administration of justice. Then, there do not exist *lacunae* in the provision of Article 35 of the Statute. It is clear and comprehensive, as the concretization of the provision of Article 93, paragraphs 1 and 2, of the United Nations Charter, which lifted a limitation to the right of judicial protection before the International Court of Justice to the rank of public order of the United Nations. As such it cannot be considered as a procedural rule. Finally, even if, *arguendo*, the requirement of *jus standi* would be defined as procedural, it would obviously represent *norme procedurale fondamentale*, incapable of any modification.

92. It appears that, contrary to the majority view, the application of the general rule *in casu* derives directly from the principle of sound administration of justice. In the syntagma "sound administration of justice", the very *administration* of justice is the substance of the principle. "The justice" as the object of "sound and proper administration" is not abstract justice but justice according to the rules of law governing the Court's judicial activity.

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[4] *Barcelona Traction, I.C.J. Reports 1964*, pp. 6, 42; *Oil Platforms, I.C.J. Reports 1998*, pp. 190-203, para. 33; p. 205, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1997*, p. 257, para. 30; pp. 257-258, para. 31.

93. The institution of proceedings before the Court, as far as its significance is concerned, "falls short only of that of the judgment itself" (G. Schwarzenberger, *International Law*, Vol. I, 1945, p. 376). It permeates, as very few rules do, the whole body of the Court's law, starting with the provision of Article 40 of the Statute, via the provisions of Articles 26 (1 *(b)*), 38, 39, 40 (2-3), 42, 46, 80, 81 up to Articles 87, 92 (1), 98 (1-3), 99 (1-2) and 104 of the Rules of Court.

On the date of the institution of the proceedings, a process relationship is established between the parties to the dispute, as well as between the parties to the dispute and the Court — a fact which *per se* produces important legal consequences for the parties to the dispute and the Court itself. From that date the conservatory effects of the Application are beginning and the litispendence goes on.

94. All in all, from that moment on, the Court starts its judicial activity *stricto sensu*, separated from the administrative action of the Registry of the Court. The principal task of the Court, in that phase of the proceedings, is to establish the existence of the necessary requirements for its jurisdiction *lato sensu*, i.e., the requirement of *jus standi*, for requirements regarding the special jurisdiction in all of its relevant aspects — *ratione personae, materiae* et *temporis* — may be perfected and even established in the course of the proceedings.

95. The proper application of the principle of sound administration of justice *in casu*, must take into account the difference between the requirement of *jus standi*, on the one side, and the requirements of jurisdiction of the Court *stricto sensu*, on the other.

An exception to the general rule regarding the date of assessment of the Court's jurisdiction might operate as regards the requirement of jurisdiction based on consent of the parties, for it does not touch the legality of the juridical activity of the Court as such.

Regarding the requirement of *jus standi*, as a matter of interpretation of a rule of the Statute, being objective law, the legal situation seems different, regardless of whether the principle underpinning the *Mavrommatis* rule is understood as a principle of judicial economy or as a principle of sound administration of justice.

The imperative wording of Article 35, paragraph 1, of the Statute, read in conjunction with Article 93 of the United Nations Charter, does not leave any doubt in that regard. For, "[t]he Court can exercise its judicial function only in respect of those States which have access to it under Article 35 of the Statute. And only those States which have access to the Court can confer jurisdiction upon it." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 298-299, para. 46; see also the ten cases in the provisional measures phase *(Yugoslavia* v. *Belgium), I.C.J. Reports 1999 (I)*, p. 132, para. 20; and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1973*, p. 53, para. 11.)

(g) Compétence de la compétence *as an improper* modus operandi

96. The application of the principles underpinning the *Mavrommatis* rule, as perceived by the majority, implies a *modus operandi*, since the principle of sound administration of justice does not operate automatically. The *modus operandi* is ascertained in the principle of *compétence de la compétence* so that it could be said that the exception to the general rule, that the jurisdiction *lato sensu* is assessed on the date of the institution of the proceedings, is, in the majority approach, the result of combined effects of the principle of sound administration of justice and *compétence de la compétence* respectively.

97. The majority view that "[t]he Court always possesses the *compétence de la compétence*" (Judgment, para. 86) is basically correct, in contrast to the interpretation of Serbia according to which, "whenever it is seised by a State which does not fulfil the conditions of access under Article 35, or seised of a case brought against a State which does not fulfil those conditions, the Court does not even have the *compétence de la competence*" *(ibid.)*.

98. *Compétence de la compétence* is an inherent right and duty of the Court, necessary for it to discharge its duties as regards jurisdictional issues *lato sensu*. As such, it operates during the entire proceedings, from the institution until the end, implying that the Court, either upon a jurisdictional objection of a party, or *proprio motu*, not only makes the determination whether it has jurisdiction in terms of incidental jurisdiction, but in that regard remains attentive during the entire proceedings. *A contrario*, the Court would be deprived of its essential duty to establish its jurisdiction *lato sensu.*

99. However, the power of the Court to determine whether it has jurisdiction is one thing, and the substance of the decision taken on the basis of the principle of *compétence de la compétence* is quite another thing. As a structural and functional principle, the principle of *compétence de la compétence* does not possess its own substance in terms of substantive law. This principle is only the legal vehicle which allows the Court to satisfy itself that the conditions governing its own competence, as defined by its Statute, are met. The decision of the Court on the basis of the principle of *compétence de la compétence* is of a declaratory nature and, as such, it can not bestow on the Court itself a jurisdiction which is not supported by applicable rules of law.

100. Due to its nature, this is especially true as regards the requirement of *jus standi*. Since the majority itself does not dispute that during the period from the dissolution of the former SFRY in April 1992 to the admission of the FRY to the United Nations on 1 November 2000, the FRY/Serbia was not a Member of the United Nations, and since the membership in the United Nations is determinative of its *jus standi*, a reasoning in the following terms seems unavoidable:

> "If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order to avert those consequences." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 36, para. 57.)

Unfortunately, the majority does not follow this wise dictum, but involves itself in the fishing of *jus standi* of Serbia.

101. The non-existence of *jus standi* of the Party in the moment of institution of the proceedings deprives the Court, as a semi-open court of law, of the power to take judicial action. In that regard, the principle of *compétence de la compétence*, as such, does not and cannot add or change anything whatsoever. For,

> "The details of this law [law of jurisdiction] have grown with the continuing exercise of the Court's *compétence de la compétence*, but its basic norm can still be traced to the Permanent Court's broad dictum that 'there is no dispute *which States entitled to appear before the Court* cannot refer to it'." (I. Shihata, *The Power of the International Court to Determine its own Jurisdiction, Compétence de la Compétence*, 1965, p. 304; emphasis added.)

(h) *Effects of seisin of the Court*

102. It seems that the majority view has overstressed the role of the seisin of the Court, attributing to it some effect in terms of substantive jurisdiction.

103. The qualifications of the seisin of the Court as "duly", "regular" or "proper" are frequently used, in the present phase of the proceedings as well, to indicate a State's recourse to the Court in a proper way. This, in fact, implies that a State has submitted an application, or that two or more States have submitted a special agreement, in conformity with the relevant provisions of the Statute of the Court and its Rules. In this sense, the expressions such as "duly seised" or "properly seised" have, first and foremost, a formal, procedural meaning.

104. Although it is a procedural act, seisin, however, is not deprived of any legal effects. By the act of seizure, the Court has acquired a measure of procedural competence "to determine its substantive jurisdiction if in question or otherwise uncertain" (G. Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: Questions of Jurisdiction, Competence and Procedure", *British Year Book of International Law*, 1958, p. 15) and to activate its inherent power to determine its jurisdiction *(compétence de la compétence)* either upon an objection of the party or *proprio motu*.

For, the law of the Court does not know, apart from the administra-

tive action of the Registry as regards non-State entities, separate proceedings designed specifically to deal with the validity of the proceedings in terms of whether necessary requirements, as established by Articles 35 and 36 of the Statute, are being fulfilled. Thus, in effect, the Court, although "properly" or "duly" seised, only *a posteriori* decides whether it possesses substantive competence to deal with the case brought before it. It seems that it is precisely this that is the *rationale of the dictum* of the Court in the *Qatar/Bahrain* case, to the effect that "the question of whether the Court was validly seised appears to be a question of jurisdiction" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 23, para. 43).

105. *Stricti juris*, the seizure of the Court is valid in substantive terms only if all the requirements for the Court's jurisdiction *lato sensu*, provided by Articles 35 and 36 of the Statute, are fulfilled. *A contrario*, seisin, regardless of whether termed "properly" or "duly", is essentially only "effective" seisin, enabling the Court to establish whether it possesses substantive competence *in casu*, or whether, in the light of the relevant requirements, it is "validly seised". (Adjectives, at least in the legal vocabulary, more often than not, hinder rather than help understanding. Thus, "proper(ly)" or "due (duly)" seisin would, in fact, be the very "seising of the Court" (G. Fitzmaurice*, op. cit.*), and "seisin" would, by definition, imply "valid seisin".)

For, as the Court stressed in subtle terms — although using the word "seising" in terms of "effective seisin" — in the *Nottebohm* case: "under the system of the Statute the seising of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations" (*Nottebohm, (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122).

106. Seisin of the Court as a procedural step is effected in practice in a highly relaxed manner. It appears that it is assumed that the fulfilment of the procedural conditions specified in Article 38, paragraphs 1, 2 and 3, and Article 39, paragraphs 1 and 2, of the Rules of Court, are sufficient in that regard. Only, "[w]hen the applicant State proposes to found the jurisdiction of the Court upon a consent" of a State against which such application is made, "[i]t shall not . . . be entered in the General List, nor any action be taken in the proceedings" (Art. 38, para. 5, of the Rules of Court). Such a manner is understandable, if the requirements under Article 36 of the Statute are in question, for the simple reason that following the seisin of the Court substantive jurisdiction may be conferred upon the Court or perfected by the parties.

107. As regards the requirements under Article 35 of the Statute, this is another matter. Having in mind the nature of the requirements and its effects upon the legality of the judicial activity of the Court, it seems essential, in particular in case of doubt or uncertainty, to determine as soon as possible whether or not the requirements under Article 35 of the

Statute are met. In contrast to the requirements under Article 35 which, being based on the consent of the parties to the dispute, cannot only be perfected but also created in the time following the seisin of the Court, the requirements under Article 36 of the Statute must be fulfilled on the date of the institution of the proceedings before the Court. Short of this, seisin of the Court is not valid, but is merely a procedural step having no effects on the substantive competence of the Court to deal with the case.

It is precisely in this that I see the meaning of the dictum of the Court in the eight *Legality of Use of Force* cases, that the Applicant "could not have properly seised the Court" (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 299, para. 46), because it was not a party to the Statute and, consequently, did not have a right to appear before the Court.

(i) *If valid, why was not the alleged exception applied in the* Legality of Use of Force *cases?*

108. It remains unclear why the Court, if found that there exists an exception to the general rule that the jurisdiction *lato sensu* is assessed on the day of the institution of the proceedings, did not apply it in the identical legal situation in the *Legality of the Use of Force* cases? The objection of Serbia (Judgment, para. 84) aims at the very heart of the majority reasoning, alluding to the violation of the fundamental principle of equality of States. The unconvincing answer of the majority to that objection is surprising. It consists of three considerations, broad in their vagueness and formalism, so that one can get the impression that they are given *formalitatis causa*.

109. Firstly, the majority finds that:

> "It was clear that Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications. That State itself argued before the Court that it was not, and never had been, bound by Article IX of the Genocide Convention, even though that was the basis for jurisdiction which it had initially invoked (e.g., *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 292-293, para. 29). It is true that the Applicant in those cases had let it be known that it did not intend to discontinue the proceedings pending before the Court; but, given the legal position it was asserting from that time on as to the Genocide Convention, it was out of the question that, in the event of judgments rejecting its applications owing to its lack of access to the Court at the date the proceedings had been instituted, it would rely on the status it would then undoubtedly possess of party to the Statute of the Court to submit fresh

> applications identical in substance to the first . . . Indeed, Serbia and Montenegro took care not to ask the Court to do so; while Croatia is asking the Court to apply the jurisprudence of the *Mavrommatis* case to the present case, no such request was made, or could logically have been made, by the Applicant in 2004." (Judgment, para. 89.)

The question of "the intention of pursuing. . . claims by way of new applications" *(ibid.)* does not seem relevant at all in the frame of the so-called *Mavrommatis* rule. In its Judgment in the *Mavrommatis* case, the Court invoked the general possibility "for the applicant to re-submit his application" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34) and not the intention. It applied rather an objective than subjective standard in that regard. In the absence of clear and unequivocal evidence of "intention" one can only speculate. The majority "infers" that the Applicant did not wish to pursue the proceedings on the basis of the argument of Serbia that it was not, and never had been, bound by Article IX of the Genocide Convention. It seems almost unbelievable that the majority, in relation to jurisdiction as a *questio juris* falling within the scope of the principle *jura novit curia,* gives decisive importance to the arguments of a party.

110. At the same time, the finding that "Serbia and Montenegro did not have the intention of pursuing its claims by way of new applications" appears to be erroneous and even *contra factum proprium*. For, in the *Legality of Use of Force* cases the Court stated *expressis verbis*:

> "it is suggested that, by inviting the Court to find that it has no jurisdiction, the Applicant can no longer be regarded as pursuing the settlement by the Court of the substantive dispute.
>
> The Court is unable to uphold these. . . contentions. . . As to the argument concerning the disappearance of the substantive dispute, *it is clear that Serbia and Montenegro has by no means withdrawn its claims as to the merits*. Indeed, these claims were extensively argued and developed in substance during the hearings on jurisdiction, in the context of the question of the jurisdiction of the Court under Article IX of the Genocide Convention. It is equally clear that these claims are being vigorously denied by the Respondents. *It could not even be said under these circumstances that, while the essential dispute still subsists, Serbia and Montenegro is no longer seeking to have its claim determined by the Court*. Serbia and Montenegro has not sought a discontinuance. . .; *and it has stated that it 'wants the Court to continue the case and to decide upon its jurisdiction — and to decide on the merits as well, if it has jurisdiction'*. In the present circumstances, the Court is unable to find that Serbia and Montenegro has renounced any of its substantive or procedural rights, or has taken the position that the dispute between the Parties has ceased to

> exist." (*Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 297, paras. 42-43; emphasis added.)

The consideration that "there would have been no justification for the Court to disregard the FRY's initial lack of capacity to seise the Court, on the ground that the defect had been cured in the course of proceedings" (Judgment, para. 89) because "Serbia and Montenegro took care not *to ask the Court to do so*" (*ibid.*; emphasis added), is not convincing. In contrast to Croatia, it seems sufficient to remark that as regards the issue of jurisdiction, the wishes of the parties are not of decisive importance, if any (paras. 46-59 above).

111. Secondly, it seems that the majority tends to introduce elements of penalizing or reward for the parties as regards the application of the exception to the general rule, depending on a party's attitude towards its *jus standi* in earlier cases. Such a conclusion stems from the consideration that:

> "At the date the Application was filed, the Respondent considered that it had the capacity to participate in proceedings before the Court, and its position in that respect was a matter of public knowledge. . . The Applicant could therefore feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction." (Judgment, para. 90.)

Therefore, "Croatia's conduct does not reflect any circumstances that would warrant a particularly strict application by the Court of the jurisprudence described above" *(ibid.)*.

112. The dictum suggests that the Court has full discretionary power regarding the application of the constitutional rules of its Statute on the basis of the assessment of the behaviour of the parties in terms of *bona fidae*, although a party's arguments might be motivated by considerations based on litigation strategy. It looks like an inversed theory of estoppel in favour of the Applicant.

Things are additionally complicated by the statement of the majority that the attitude of the Respondent as regards its *jus standi* in the relevant period makes that the Applicant "could. . . feel entitled to seise the Court on what at first sight seemed to be an appropriate basis of jurisdiction" *(ibid.)*. Such a statement seems highly doubtful.

113. Apart from the issue of the relevance of the arguments of the Parties as regards the jurisdiction *lato sensu* and that *in concreto* the question in issue is not "the basis of jurisdiction" but the "capacity to appear before the Court", the true meaning of the majority's consideration is that the Applicant, for utilitarian purposes, relied on the earlier arguments of the Respondent as regards its *jus standi*. For, the fundamental premise of the Croatian policy, which is a matter of common

knowledge consistently applied, is that the SFRY was dissolved into six legally equal parts, so that the FRY, according to that premise, does not have continuity with the SFRY, and, consequently, no continuity as regards the membership in the United Nations[5]. And without continuation in the membership of the SFRY in the United Nations, the FRY/Serbia simply could not have the status of a party to the Statute of the Court.

114. Further, the majority's consideration seems also dubious in the light of the arguments of the Applicant itself. It appears probable that the Applicant relied in fact on the decisions of the Court taken in the different phases of the *Bosnia* case as regards the *jus standi* of FRY/Serbia, expecting, as it is shown rightly, that they will overcome the jurisprudence which consists of the Judgments in the eight *Legality of Use of Force* cases, the *Fisheries Jurisdiction* and *Monetary Gold* cases. This expectation was described in a condensed form by counsel of Croatia. He said:

> "Croatia took account of the provisional measure Orders and the 1996 Judgment. It relied on the Court's reasoning as authoritative. It had a reasonable expectation that the Court would, following a principle of judicial certainty, adopt the same reasoning in future cases where the facts in issue were, to all intents and purposes, identical." (CR 2008/10, p. 31, para. 12).

As Serbia's real target in the proceedings, according to that view, was "the Court's recent Judgment in the *Bosnia* case. It wants a judgment . . . that will allow it to minimize, neutralize, and — eventually — abandon the *Bosnia* Judgments of 2007 and 1996 as an anomaly" (*ibid*., pp. 27-28, para. 2), then, in the view of the Applicant, the Court's decision in terms of a rescue operation of the legality of the jurisdictional decision in the *Bosnia* case was expected.

115. Thirdly, another additional consideration is even more unconvincing than the previous two. The majority states that

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[5] *Exempli causa*, in its Memorial, Croatia pointed out, *inter alia*, that "[n]either Croatia nor any of the other Republics of SFRY which became independent accept that FRY was the 'continuation' in a legal sense of the SFRY" (Memorial, para. 2.138, footnote 220).

In his letter of 16 February 1994 addressed to the Secretary-General, the Permanent Representative of Croatia to the United Nations takes a position on the "declaration adopted on 27 April 1992 at the joint session of the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro" (UN doc. S/1994/198 (1994)).

The question seems clear and unequivocal: "The Republic of Croatia strongly objects to the pretensions of the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue the state, international, legal and political personality of the former Socialist Federal Republic of Yugoslavia."

> "while Croatia's Application — a short text comprising some ten pages — was filed on 2 July 1999, that is prior to the admission of the FRY to the United Nations on 1 November 2000, its Memorial on the merits, a document of 414 pages, was submitted on 1 March 2001, after that date" (Judgment, para. 90).

Although saying that "it is not possible to equate the filing of a memorial with that of an instrument instituting proceedings" *(ibid.)*, the majority in fact passes half of the way in this equation. Given the fact that it "expounds the Applicant's arguments, but also . . . specifies the submissions" *(ibid.)*, the majority view is that that "it cannot be entirely ignored" *(ibid.)*.

Apart from the fact that such an equalizing has no basis whatsoever in the Statute and in the Rules of Court, it implicitly derogates, or at least substantially dilutes, the basic thesis of the majority on the existence of the exception to the general rule that the jurisdiction of the Court must be assessed on the date of institution of the proceedings. For, on the basis of such determination of the Memorial of Croatia, the majority concludes that "if Croatia had submitted the substance of its Memorial, on 1 March 2001, in the form of a new application, as it could have done, no question with respect to Article 35 of the Statute would have arisen" *(ibid.)*.

2. *Jurisdiction* ratione materiae

(a) *General approach of the majority*

116. The present Judgment, in contrast to the 1996 Judgment (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, I.C.J. Reports 1996 (II)*, p. 613, para. 26) treats the 1992 declaration as the basis of the jurisdiction *ratione materiae*. The turn in the treatment of the declaration, which in the 1996 Judgment was perceived by the majority as a proper basis of the jurisdiction of the Court *ratione personae* (paragraphs 18-20 above), seems to be dictated by the needs of an *ad hoc* construction of the Judgment by necessary implication applied in the 2007 Judgment.

117. The declaration was adopted by the participants of the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro, on 27 April 1992. The text of the declaration reads as follows:

> "The representatives of the people of the Republic of Serbia and the Republic of Montenegro,
>
> Expressing the will of the citizens of their respective Republics to stay in the common state of Yugoslavia,
>
> Accepting all basic principles of the Charter of the United Nations and the CSCE Helsinki Final Act and the Paris Charter, and par-

ticularly the principles of parliamentary democracy, market economy and respect for human rights and the rights of national minorities,

Remaining strictly committed to a peaceful resolution of the Yugoslav crisis, *wish to state in this Declaration their views on the basic, immediate and lasting objectives of the policy of their common state, and on its relations with the former Yugoslav Republics.*

In that regard, the representatives of the people of the Republic of Serbia and the Republic of Montenegro declare:

1. The Federal Republic of Yugoslavia, continuing the state, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the SFR of Yugoslavia assumed internationally,

At the same time, it is ready to fully respect the rights and interests of the Yugoslav Republics which declared independence. The recognition of the newly-formed states will follow after all the outstanding questions negotiated on within the Conference on Yugoslavia have been settled,

Remaining bound by all obligations to international organizations and institutions whose member it is, the Federal Republic of Yugoslavia shall not obstruct the newly-formed States to join these organizations and institutions, particularly the United Nations and its specialized agencies. The Federal Republic of Yugoslavia shall respect and fulfil the rights and obligations the SFR of Yugoslavia assumed vis-à-vis the territories of Krajina which have been placed, within the framework of the United Nations peace-keeping operation, under the protection of the world Organization.

The Federal Republic of Yugoslavia also remains ready to negotiate, within the Conference on Yugoslavia, all problems related to the division of assets, which means both to assets and debts acquired jointly. In case of a dispute regarding these issues, the Federal Republic of Yugoslavia shall be ready to accept the arbitration of the Permanent Court of Arbitration in The Hague.

2. The diplomatic and consular missions of the Federal Republic of Yugoslavia abroad shall continue without interruption to perform their functions of representing and protecting the interests of Yugoslavia. Until further notice, they shall continue to take care of all the assets of Yugoslavia abroad.

They shall also extend consular protection to all nationals of the

SFR of Yugoslavia whenever they request them to do so until a final regulation of their nationality status.

The Federal Republic of Yugoslavia recognizes, at the same time, the full continuity of the representation of foreign states by their diplomatic and consular missions in its territory.

3. The Federal Republic of Yugoslavia is interested in the reinstatement of economic, transport, energy and other flows and ties in the territory of the SFR of Yugoslavia. It is ready to make its full contribution to that end.

4. The Federal Republic of Yugoslavia has no territorial aspirations towards any of its neighbors. Respecting the objectives and principles of the United Nations Charter and CSCE documents, it remains strictly committed to the principle of *non-use* of force in settling any outstanding issues.

5. The Federal Republic of Yugoslavia shall ensure the highest standards of the protection of human rights and the rights of national minorities provided for in international legal instruments and CSCE documents. In addition, the Federal Republic of Yugoslavia is ready to grant the national minorities in its territory all those rights which would be recognized to and enjoyed by the national minorities in other CSCE participating states.

6. In its foreign relations, the Federal Republic of Yugoslavia shall be guided by the principles of the United Nations Charter, as well as the principles of CSCE documents, particularly the Paris Charter for New Europe. As the founding member of the Movement of non-aligned countries, it shall remain committed to the principles and objectives of the policy of non-alignment.

It shall develop relations of confidence and understanding with its neighbors proceeding from the principle of good neighborliness. The Federal Republic of Yugoslavia shall, as a State of free citizens, be guided in its democratic development by the standards and achievements of the Council of Europe, the European Community and other European institutions, with an orientation to join them in the foreseeable future." (United Nations doc. A/46/915, Ann. II; emphasis added.)

118. In its 1996 Judgment the Court perceived the declaration as a unilateral act that *per se* produced legal consequences relevant as regards its jurisdiction *ratione personae*. The Court found that by way of the declaration the FRY expressed the intention "to remain bound by the international treaties to which the former Yugoslavia was party" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17) and, on that

basis, could be considered as bound by the Genocide Convention on the date of filing of the Application by Bosnia and Herzegovina.

119. *De novo* assessment of the nature and effects of the 1992 declaration is necessary, not only because of the fact that the 1996 Judgment is not *res indicata* in the present case, but primarily due to substantial reasons. The reasons regarding the new developments, legal and factual, should be added to the reasons which existed at the time of the adoption of the 1996 Judgment and considered *in toto*.

In the light of the developments which took place following the adoption of the 1996 Judgment, and especially the admission of the FRY to the UN membership in a double capacity — as a new Member and as a successor State — it comes out that, as regards the perception of the nature and effects of the declaration, the 1996 Judgment was a kind of interim judgment based on the continuity presumption. As such, it is deprived of precedental authority *in casu*.

(b) *Whether the 1992 declaration could be considered a unilateral legal act in terms of international law?*

120. It seems obvious that the issue of an act by a single State cannot by itself qualify as a unilateral act capable of producing legal effects *in foro externo*. The unilateral nature of an act is but one extrinsic element which, when coupled with other elements, both extrinsic and intrinsic, forms a unilateral legal act in terms of international law.

121. In the circumstances of the case at hand a number of elements are of special relevance. The primary extrinsic element concerns the capacity of the participants in the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro to perform unilateral acts in the sense of international law. This Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia and the Assembly of the Republic of Montenegro was not constituted as the Parliament of the Federal Republic of Yugoslavia; rather it was a body of representatives *in statu nascendi*. Even if, *arguendo*, it represented the Parliament, it was obviously not a State organ possessing the capacity to perform unilateral acts on behalf of the State. Representatives of a State for purposes of formulating unilateral legal acts are Heads of State, Heads of Government and ministers of foreign affairs[6]. This rule has also been confirmed in the jurisprudence of the Court (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 269-270, paras. 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections,*

[6] Art. 4, Report on Unilateral Acts of States, *Yearbook of the International Law Commission*, 1998, Vol. II, Part One, doc. A/CN.4/486; United Nations doc. A/CN.4/500 and Add. 1.

Judgment, I.C.J. Reports 1996 (II), p. 622, para. 44; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 21-22, para. 53; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006*, p. 27, para. 46; see also *Legal Status of Eastern Greenland (Denmark* v. *Norway), Judgment, 1933, P.C.I.J., Series A/B, No. 53*, p. 71). Consequently, it appears that the declaration, if designed as a unilateral legal act *in foro externo*, was issued by an incompetent organ under international law and, as such, produced no legal effects[7].

122. True, the declaration, as the Court found, "was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17). The word "confirmed" in the present context may have two meanings: a descriptive one in the sense that the letter from the Permanent Representative reproduced the text of the declaration and a meaning as a *"terminus technicus"*, signifying confirmation of a unilateral act of an unauthorized State organ. Neither of these two possible meanings of the word "confirmed" can be accepted *in concreto*. In respect of the descriptive meaning of the word "confirmed", it is obvious that the Note from the Permanent Representative[8] reproduces the text of the declaration only in part, i.e., citing only a small part thereof relating exclusively to legal identity and continuity.

By definition, the limited powers held by heads of permanent missions to international organizations, including permanent missions to the United Nations, negate the possibility of the official Note of the Permanent Mission of Yugoslavia of 27 April 1992 being understood as "con-

[7] See Art. 4 (subsequent confirmation of an act formulated by a person not authorized for that purpose) in the Third Report of the Special Rapporteur, *Yearbook of the International Law Commission*, 2000, Vol. I, p. 96.

[8] The text of the Note reads:

> "The Assembly of the Socialist Federal Republic of Yugoslavia, at its session held on 27 April 1992, promulgated the Constitution of the Federal Republic of Yugoslavia. Under the Constitution, on the basis of the continuing personality of Yugoslavia and the legitimate decisions by Serbia and Montenegro to continue to live together in Yugoslavia, the Socialist Federal Republic of Yugoslavia, consisting of the Republic of Serbia and the Republic of Montenegro.
>
> Strictly respecting the continuity of the international personality of Yugoslavia, the Federal Republic of Yugoslavia shall continue to fulfil all the rights conferred to, and obligations assumed by, the Socialist Federal Republic of Yugoslavia in international relations, including its membership in all international organizations and participation in international treaties ratified or acceded to by Yugoslavia." (United Nations doc. A/46/915, Ann. I.)

firmation" of an act issued by an organ, if at the material point in time it was an organ incompetent under international law to perform legal acts on behalf of the State.

123. Hence the proper characterization of the Note of the Yugoslav Permanent Mission of 27 April 1992 is that of a *transmission* of the declaration, followed by the corresponding reproduction of a part of the declaration directly connected with the Federal Republic of Yugoslavia's proclaimed legal identity with, and continuation of, the former SFRY vis-à-vis the United Nations.

124. This characterization of the Note of the Yugoslav Permanent Mission suggests that the declaration of 27 April 1992 and the Note of the Permanent Mission are two distinct, yet not totally separate acts, both by their nature and by their effects. For its part, the declaration is basically a general statement of policy with respect to matters directly or indirectly connected with the issue of the proclaimed legal identity and State continuity of the Federal Republic of Yugoslavia, while the Note seems to be primarily a notification in the standard sense. Evidence to this effect is found in the fact that the addressee of the Note was the Secretary-General, who was requested to circulate the declaration and the Note as an official document of the General Assembly[9], whereas the declaration as such was addressed *urbi et orbi*.

(c) *The issue of intention*

125. The intention to produce a proper legal effect is a common element of unilateral legal acts. In that regard, unilateral acts are always a manifestation of the will of a State. However, the intention to produce legal consequences is not *per se* sufficient to give to unilateral act as such the character of legal undertaking.

In that respect, unilateral legal acts may be divided into two groups: unilateral legal acts which produce legal effects on its own, and unilateral legal acts which produce proper legal effects on the basis of acceptance or acquiescence by another State or States (paras. 126-128, and 134 below).

The 1992 declaration would represent, in that respect, a mixture of those two kinds of unilateral acts. Its point 4 might have legal effects on its own, and that would be the act of renouncing the territorial aspirations towards the neighbouring countries. The other points of the declaration would imply the acceptance or acquiescence of other States in order to produce proper legal effects.

126. It appears that in the 1996 Judgment, the majority applied mechanically the legal formula from the *Nuclear Tests* cases to point 1 of the declaration saying that:

"The Federal Republic of Yugoslavia, continuing the State, inter-

[9] United Nations doc. A/46/915.

> national legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17.)

That formula could not be applied to the declaration.

127. The well-known dictum of the Court in the *Nuclear Tests* cases reads as follows:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should be bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 43; *Nuclear Tests (New Zealand* v. *France), ibid.*, p. 472, para. 46.)

In the *Nuclear Tests* cases the act in issue was a unilateral legal act capable of producing legal effect of its own, being an expression of "the power of auto-limitation which States enjoyed under international law, in other words, their ability in the exercise of their sovereignty to subject themselves to international legal obligations" (see V. Rodríguez Cedeño, Special Rapporteur, *Yearbook of the International Law Commission*, 1998, Vol. II, Part Two, p. 53, para. 140).

128. The 1992 declaration, although being a unilateral act, is not capable of producing legal effects *per se*, without the acceptance by other States. The continuity claim on which it was based — "continuing the State, international legal and political personality of the SFRY, [it] shall strictly abide by all the commitments that the SFRY assumed internationally" — had to be, as such, accepted by the international community in order for the relevant part of the declaration to produce legal effects. Otherwise, the 1996 Judgment would create a general principle, according to which any interested State could determine, in the form of a unilateral act, its objective legal status in terms of the dichotomy continuator State/successor State, including its membership in the international organizations. For, in the very point of the declaration in which its authors said that the FRY "shall strictly abide by all the commitments that the SFRY assumed internationally" it is also said that the FRY is

"remaining bound by all obligations to international organizations and institutions whose member it is" including "particularly the United Nations and its specialized agencies".

However, the continuity claim as a legal basis of the declaration was not generally accepted. That appears to be a matter of common knowledge.

(d) *Whether the "intention of the FRY" is separable from the continuity condition?*

129. The idea which is underlying the majority reasoning is that the "intention of the FRY to abide by all the commitments that the SFRY assumed internationally" is separable from the continuity condition since it was not expressed in explicit terms. It implies that the continuity premise, since it was not explicitly formulated in terms of the condition of validity of the declaration, represents, in fact, only a motif for its adoption, which would *per se* be irrelevant.

130. In the light of the text of the declaration, the idea seems abstract and divorced from its natural and ordinary meaning. The undertaking "shall strictly abide by all the commitments that the SFRY assumed internationally" is given by the FRY as "continuing the State, international legal and political personality of the SFRY". Relevant in that sense are also the *travaux préparatoires* of the declaration. At the meeting of the Federal Chamber of the Assembly of the SFRY held on 27 April 1992, which proclaimed the Constitution of the FRY, the President of the Assembly of Serbia emphasized, in his introductory speech *inter alia* that *"Serbia and Montenegro do not recognize that Yugoslavia is abolished and ceased to exist"* (*Politika*, Belgrade, 28 April 1992, p. 6; emphasis added). Another opening speaker, the President of the Assembly of Montenegro, pointed out, *inter alia*, that Serbia and Montenegro were "the only States which brought their statehood with them on the creation of Yugoslavia and *decided to constitutionally rearrange the former Yugoslavia*" (*ibid.*; emphasis added).

That fact was not contested by the then Applicant — Bosnia and Herzegovina — which asserted that "it is on the basis of this alleged 'continuity' that Yugoslavia (Serbia and Montenegro) considers itself to be bound by all international commitments undertaken by the former SFRY" (Memorial, p. 160, para. 4.2.2.11).

131. As such, it is a declaration of continuity out of which comes *ex lege* that the FRY strictly abides by the commitments assumed by the SFRY. The wording "abide by all the commitments that the SFRY assumed internationally" is, in fact, a claim for legal identity

with the SFRY which, by itself, represents the basis and substance of the continuity as the operational, functioning side of a single institution.

132. In the 1992 declaration, the continuity claim is an inherent condition, its *rationale* and the element permeating the declaration as a whole. It is more than a formal condition, for the declaration would be devoid of substance without the continuity claim. If the declaration was intended to produce legal effects irrespective of continuity, these effects would have been expressed as the confirmation or safeguarding of rights and obligations created by the treaty commitments of the SFRY rather than, as inferred by the Court itself, in terms to "*remain bound* by the international treaties to which the former Yugoslavia was party" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 610, para. 17; emphasis added).

133. The idea of the separability of the intention of the FRY to abide by all the commitments of the SFRY and the continuity premise is sharply, almost irreconcilably opposed also to the rules of interpretation of unilateral legal acts of States, well settled in the jurisprudence of the Court. Where unilateral acts of States are to be interpreted, "declarations. . . *are to be read as a whole*" (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 454, para. 47; emphasis added) and "interpreted *as a unity*" (*ibid.*, p. 453, para. 44; emphasis added). Further, unilateral acts "must be interpreted as [they stand,] having regard to the words actually used" (*Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105). Finally, when States "make statements by which their freedom of action is to be limited, a *restrictive interpretation is called for*" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), ibid.*, p. 473, para. 47; emphasis added).

134. The intention of the authors of the acts, incapable of producing legal effects *per se* made in treaty pattern, is of a specific nature. Regarding that particular group of unilateral acts, the consideration of the Court in the *Nuclear Tests* cases, that "nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect" (*I.C.J. Reports 1974*, p. 267, para. 43) does not stand. For, the object of unilateral acts made in treaty pattern, is not an obligation *stricto sensu*, by way of which the authors limit themselves in the exercise of its sovereignty, but a synallagmatic obligation immanent to treaties. As regards those kind of unilateral legal acts, the intention is only the *cause* which must be accompanied by a proper treaty action in order to produce the intended effects (para. 153 below). If not, the

fundamental principle *pacta tertiis nec nocent nec prosunt* would be infringed.

(e) *The effects of the 1992 declaration*

135. The intention of the authors of the 1992 declaration seems clear on the face of the declaration itself. In its preamble it is said that the participants in the Joint Session of the Assembly of the SFRY, the National Assembly of the Republic of Serbia, and the Assembly of the Republic of Montenegro, as its authors, "wish to state in this Declaration *their views* on the basic, immediate and lasting *objectives of the policy* of their common state, and on its relations with the former Yugoslav Republics" (emphasis added). In that respect, it can be compared with the communication of the Junta of the Government of National Reconstruction of Nicaragua to the Secretary-General of the Organization of American States, accompanied by the "Plan to secure peace" which the Court in the *Nicaragua* case determined as

> "This part of the resolution is a *mere statement* which does not comprise any formal offer which if accepted would constitute a promise in law, and hence a legal obligation. . . an *essentially political pledge*, made not only to the Organization, but also to the people of Nicaragua, intended to be its first beneficiaries" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 132, para. 261; emphasis added).

136. It should be noted that the declarations of the Assembly in the constitutional system of Yugoslavia have, since its foundation, been treated as general political acts having for its object the issues not included in the competence of the Assembly (M. Snuderl, *Constitutional Law*, Ljubljana, Vol. II, 1957, p. 47; A. Fira, *Constitutional Law*, Belgrade, 1977, p. 381).

(f) *Could the 1992 declaration be considered a notification of succession?*

137. The majority treats the 1992 declaration in a specific way, different from that implemented in the 1996 and 2007 Judgments. While in the 1996 and the 2007 Judgments the 1992 declaration is perceived as a unilateral legal act producing *per se* effects in terms of the determination of the FRY as a party to the Genocide Convention, in the present Judgment the declaration is put in a broader context of the succession in respect of treaties. Basically, the majority treats it as a notification of succession. And the succession itself, in respect of treaties, is in the majority reasoning, coloured by the logic of automatic succession without speaking its name.

138. In that regard, the majority finds that:

> "In the case of succession or continuation on the other hand, the act of will of the State relates to an already existing set of circumstances, and amounts to a recognition by that State of certain legal consequences flowing from those circumstances, so that any document issued by the State concerned, being essentially confirmatory, may be subject to less rigid requirements of form." (Judgment, para. 109.)

And, further, that the idea is reflected in:

> "Article 2 *(g)* of the 1978 Vienna Convention on Succession of States in respect of Treaties . . . defining a 'notification of succession' as meaning 'in relation to a multilateral treaty, *any notification, however framed or named*, made by a successor State expressing its consent to be considered as bound by the treaty'" *(ibid.)*.

139. It appears, however, that "any document issued by the State" *(ibid.)*, may, as a matter of law, mean only the document issued by an organ competent under international law to act on behalf of a State. The principle seems to be generally recognized in international law (Head of State principle).

140. The majority interprets "being. . . confirmatory" *(ibid.)* in the context of "an already existing set of circumstances. . . [as amounting] to a recognition by that State of certain legal consequences flowing from those circumstances" *(ibid.)*. Further, that the 1992 declaration referred "to a class of instruments which was perfectly ascertainable. . . the treaty 'commitments'. . . the Genocide Convention was one of these 'commitments'" (*ibid.*, para. 108.)

141. The finding, it seems, starts from the perception of notification of succession as confirmation that the Respondent is bound by a "perfectly ascertainable" *(ibid.)* class of instruments which includes the Genocide Convention, on the basis of law *(plein du droit)*.

True, such an understanding might correspond to the grammatical meaning of Article 34 of the Convention on Succession of States in respect of Treaties which is, however, substantially modified in the practice of States. None of the successor States, following the entry into force of the Convention, acted in the way implying that the notification of succession meant confirmation that the transfer of rights and obligations of the predecessor State occurred *ipso jure*. The majority itself does not refer to any practice in that regard. Successor States, most of them being at the same time Contracting Parties to the Convention on Succession of States in respect of Treaties, treated the continuity rule provided in its Article 34 "only as main and general flexible rule covering everything that has emerged in the region involving State succession" (H. Bokor-Szego, "Questions of State Identity and State Succession in Eastern and Central Europe", *Succession of States*, 1999, ed., by M. Mrak, pp. 104-105). The

residual and *jus dispositivum* nature of the rules on succession on the one hand, and the general notion of succession of States given in Article 2, paragraph 1 *(b)*, of the Convention, leaving aside any connotation of inheritance of rights and obligations on the occurrence of change of sovereignty, on the other, give supportive force to such practice of successor States.

142. The majority has made an impressive effort to construct conditions for the application of the *Mavrommatis* principle as it sees it, in order to escape the inescapable — to consider the relationship of the Respondent vis-à-vis the Genocide Convention within the general law on succession of States in respect of treaties. For that purpose it resorts to the inversed order of examination of the Applicant's contentions, by first examining the alternative contention regarding the 1992 declaration, with the explanation that

> "if Croatia's contentions as to the effect of the declaration and Note are accepted, the need does not arise for the Court further to address the arguments put to it by the Parties concerning the rules of international law governing State succession to treaties including the question of *ipso jure* succession to some multilateral treaties" (Judgment, para. 101).

However, Croatia's contentions as to the effect of the 1992 declaration have been designed within the law on succession. Counsel for the Applicant pointed out, *inter alia*, that

> "The famous letter [Note] the Respondent sent to the Secretary-General on 27 April 1992 was not an offer to those States who agreed with the FRY's continuity thesis that the FRY would not commit genocide or otherwise breach its treaty obligations. It was neither relative nor qualified. Nor was it expressed to be prospective; it was drafted. . . in terms of continuity. *The Respondent was a party by succession to the Genocide Convention from the beginning of its existence as a State.*" (CR 2008/11, p. 9, para. 7 (Crawford); emphasis added. See also Written Statement of Croatia, p. 3; Preliminary Objections of Serbia, Ann. 7.)

As the Applicant sees succession as "a distinct mode of transmission of treaty obligations. . . retrospective to the commencement of the successor State" (CR 2008/11, p. 9, para. 8 (Crawford)), it is obvious that one is dealing here with automatic succession.

143. Moreover, the majority itself suggests that the FRY acquired the status of party to the Convention by a process that is to be regarded as succession. True, in its *conclusio* the majority finds that "both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001" (Judgment, para. 117) by its combined effects make the Respondent a Contracting Party to the Genocide Convention as from 1992. However,

the element "conduct of the FRY" could hardly have any substantial role (paras. 160-166 below), which is also attested to by the final position of the majority to the effect that "the 1992 declaration and Note *had the effect of a notification of succession by the FRY to the SFRY in relation to the Genocide Convention* (Judgment, para. 117; emphasis added).

144. It appears indisputable that, before the adoption of the Convention on Succession of States in respect of Treaties, it is not possible to speak of automatic succession in terms of customary law. As an Expert Consultant of the Conference, Sir Francis Vallet, emphasized:

> "The rule [in Article 2 — Succession of States in cases of separation of parts of a State — corresponding to Article 34] was not based either on established practice or on precedent, it was a matter of the progressive development of international law rather than of codification." (Summary Records, Committee of the Whole, 48th meeting, 8 August 1978, doc. A/CONF.80/16/Add.1, p. 105, para. 10.)

The automatic succession as a rule of customary law began to be discussed after the 1990s, with reference to the practice of the successor States of the USSR, the Czechoslovak Socialist Republic and the SFRY and the related pronouncements of some human rights bodies, in particular the Human Rights Committee.

However, what is involved here is a theory, a construction *de lege ferenda* without foundation in practice. The allegedly consistent practice in that regard is the result of a creative interpretation exceeding the permissible interpretative framework. Even if the practice of the successor States was most consistent, the question of *opinio juris* remains open, because a good part of that practice has been modelled under the influence of conditional recognition, which also implied the acceptance of the standard of respect for human rights[10], practised as regards those successor States.

145. It appears that none of the successor States applied the practice of confirmatory notification in a generalized form, which alone perfectly corresponds with the conception of the *ipso jure* transfer of the rights and obligations from the predecessor State to the successor State (s), but declared themselves bound by the treaties of their predecessor State in their own name, applying different modalities. Besides, universal succession implies not only *ipso jure* transfer of treaty rights and obligations, but transfer *uno ictu* comprising *all* the treaty rights and obligations of the predecessor State, together with the reservations made, excluding boundary treaties or territorial settlement. The fact that the modalities

[10] "Guidelines for the Recognition of New States in Eastern Europe", *International Legal Materials*, Vol. 31 (November 1992), pp. 1485-1487.

applied have, or may have, the effect of a *continuum* of treaty rights and obligations does not mean automatic succession — although it is implied — because that *continuum* is created not by the operation of the rule of international law *(ipso jure)* but by the will of the successor State. It is difficult, *exempli causa*, to qualify the notification of succession of Bosnia and Herzegovina of 29 December 1992 in terms of automatic succession if it states that "*having considered* the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 to which the former SFRY was a party, *wishes to succeed* to the same" (Communication from the Secretary-General of the United Nations dated 18 March 1993 (ref. C.N. 451-1992, Treaties 5 (Depositary Notification)), entitled "Succession by Bosnia and Herzegovina"; emphasis added).

146. In that crucial point which is, in fact, the point of differentiation between automatic succession and succession of treaties of the predecessor State by the will of the successor State, the practice of the successor States seems consistent.

The Minsk Accords of 8 December 1991, signed by Russia, Belarus and Ukraine, providing for the unconditional commitment to honour treaty obligations of the USSR, appeared to lay conventional foundations for universal succession of the treaties of the former USSR. However, the subsequent Alma-Ata Accords modified the commitment to fulfil treaty obligations of the former Soviet Union to the extent that such continuation was "in accordance with constitutional procedures" of the successor State (P. R. Williams, "The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia and Czechoslovakia: Do They Continue in Force?", 23 *Denver Journal of International Law and Policy* 1, 1994-1995, pp. 22-23; see also R. Mullerson, "The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia", 42 *International and Comparative Law Quarterly*, 1993, p. 479). Acting on that basis, the Baltic republics opted to accede to conventions of the USSR in their own right (J. Klabbers, "State Succession and Reservations to Treaties", in J. Klabbers and R. Lefeber, *Essays on the Law of Treaties*, 1998, p. 111), while Moldova, Uzbekistan and Turkmenistan explicitly adopted the clean State model (B. Stern, "Rapport préliminaire sur la succession d'Etats en matière de traités" (Report submitted to the International Law Association's Committee on Aspects of the Law of State Succession for the 1996 Helsinki Conference), p. 675). Turkmenistan, Kazakhstan, Kyrgyzstan and Tajikistan issued notifications of succession in their own right, without any reference to reservations and declarations made by the Soviet Union as a predecessor State (J. Klabbers, *op. cit.*, p. 113). Consequently, the former Soviet republics widely practised accession as a means of binding themselves by multilateral treaties to which the USSR was a party.

147. The practice of the Czech and the Slovak Republics is also not free from inconsistency, although these two States notified the Secretary-General of the United Nations that they consider themselves bound by the multilateral treaties to which the former Czechoslovakia was a party. Inconsistency is reflected not only in the fact that they consider themselves bound as from different dates (the Czech Republic as from 1 January 1993 and Slovakia as from 31 December 1992), but also because, in spite of confirmatory notifications relating to the multilateral treaties to which Czechoslovakia was a party, they also issued notifications on succession in respect of particular treaties, while they acceded to some others. Thus the Czech Republic became a party to the 1985 International Convention against Apartheid in Sports by succession, whereas Slovakia did not. Also, whereas Slovakia succeeded to most treaties on the date of general notification, the Czech Republic, in a number of cases, succeeded on the basis of notification of succession which followed on a later date (see J. Klabbers, *op. cit*, pp. 117-118). As regards some multilateral conventions, the Czech Republic bound itself in the form of accession, although in question were conventions to which the former Czechoslovakia was a party such as, for example, the Convention on International Civil Aviation (P. R. Williams, *op. cit*., p. 41).

148. The legal situation as regards the former Yugoslav republics is much more contradictory. At first, while the FRY stuck to the continuity claim until 2000, Slovenia, Croatia, Bosnia and Herzegovina and Macedonia *ab ignitio* considered themselves as successor States and were recognized as such by the international community. Further, although declaratively favouring automatic succession in respect of multilateral treaties to which the SFRY was a party, in particular Bosnia and Herzegovina and Croatia in proceedings before the Court, they did not apply the automatic succession pattern of treaty action in practice. Thus, for instance, Bosnia and Herzegovina designed its notification on succession to the Genocide Convention in terms of a "wish" to succeed to same, which fits in with the concept of succession in its own right rather than automatic succession. Particularly illustrative is the case of the 1989 Convention on the Rights of the Child. Bosnia and Herzegovina is listed as having succeeded on 1 September 1993; Croatia succeeded on 12 October 1992; Slovenia succeeded on 6 July 1992 and Macedonia did so on 2 December 1993 (*Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1993*, United Nations doc. ST/LEG/SER./E/11-12, pp. 193-194). None of these dates corresponds to the dates upon which those republics succeeded the SFRY according to the generally accepted opinion of the Badinter Arbitration Commission (*International Legal Materials*, Vol. 32, 1993, pp. 1587-1589). The Commission established the following dates in that regard: 8 October 1991 in the case of the Republic of Croatia and the Republic of Slovenia; 17 November 1991 in the case of the former Yugoslav Republic of Macedonia; 6 March

1992 in the case of the Republic of Bosnia and Herzegovina. Finally, this contradictory practice seems to be nothing more than the expression of a confused and ambivalent attitude towards the automatic succession rule. For example, at a meeting of Legal Advisers on International Public Law convened by the Committee of Ministers for the Council of Europe on 14-15 September 1992, the representative of Croatia noted that Croatia would respect all the treaties of the SFRY unless they conflicted with the Croatian Constitution (Committee of Legal Advisers on International Public Law for the Council of Europe, 4th meeting 14-15 September 1992, p. 3). Slovenia, as stated by its representative "had been invited to accede to some conventions to which former Yugoslavia had been a party and would like to be invited to accede to other conventions which had been ratified by the former federation" *(ibid.)*.

149. It comes out that the rule contained in Article 34 of the Convention on Succession of States in respect of Treaties did not generate the rule of general international law on *ipso jure* transfer of the treaty rights and obligations from the predecessor State to the successor State.

Moreover, it has not even become a *jus perfecta* as a conventional rule. Before the Convention even came into force in 1978, the automatic succession rule provided in its Article 34 was modified by the practice of successor States, followed by acceptance of that practice by existing States. The absence of objections to notifications of succession in its own right as regards multilateral treaties to which their predecessor States were parties as well as to numerous accessions[11] to those treaties are credible evidence in that regard. In short, Article 34 of the Convention remained an empty provision, a conventional project which was not materialized.

Even if it had not been modified before the coming into force of the Convention on Succession of States in respect of Treaties, the rule *qua* treaty rule is inapplicable *in casu*, since it entered into force in November 1996, well after the dissolution of the SFRY.

Retroactive effects of the Convention are excluded in its Article 7, paragraph 1, which provides that "the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention".

150. If so, automatic succession in respect of treaties is the expression of diplomatic or political considerations rather than a rule in harmony with common sense and legal considerations.

[11] *Exempli causa*, most of the successor States of the USSR acceded to the Genocide Convention (Azerbaijan (16.VIII.1996); Armenia (23.VI.1998); Georgia (11.X.1993); Kazakhstan (26.VIII.1998); Kyrgyzstan (5.IX.1997); Moldova (26.I.1993); Uzbekistan (9.IX.1999)) along with other successor States such as Algeria (31.X.1963); (Rwanda (16.IV.1975); Tonga (16.II.1972).

First of all, if we stick to the difference between the predecessor State and the successor State, in terms of legal personality, it is unclear how the successor State, as a new State, may be considered bound by the will of the predecessor State, being another State in legal terms. Such an understanding obliterates the difference between the predecessor State and the successor State as distinct legal personalities and relies on the fiction that, in respect of treaties, their wills concur. (See, for instance, the concept of succession as substitution plus continuation according to which "[d]er Nachfolger des Völkerrechts aber tritt in Rechte und Pflichten seines Vorgängers so ein, als wären es seine eigenen" (H. M. Huber, *Beiträge zu einer Lehre von der Staaten-succession*, Berlin, 1897, p. 14).) Further, a rule on automatic succession runs counter to the fundamental principle of equality of States to the detriment of successor States. Successor States, by applying this rule, would be deprived of the rights which, otherwise, States have when expressing consent to be bound, such as, for example, making a reservation in respect of part of a treaty or accepting to be bound by a treaty under certain conditions. Finally, automatic succession rests on, or is substantially close to, the idea of universal succession in civil law which is incompatible with an essentially consensual order, in which the main subjects (legal persons) are States as equal and sovereign political entities.

As far as the effects of automatic succession in respect of treaties are concerned, it would not substantially contribute to legal stability and certainty, because it lies on the shoulders of the norms of *jus cogens* as the most perfect part of the structure of international law.

151. Erroneous is the thesis that, in the absence of *ipso jure* transfer of the rights and obligations, there appears a time gap in the application of the rules prohibiting the crime of genocide. In contrast to its procedural provisions, including Article IX, the substantive provisions of the Genocide Convention, being part of the *corpus juris cogentis*, bind any successor State, regardless whether it is, or is not, a Contracting Party to the Convention. The rules of *jus cogens* as peremptory, absolutely binding, rules, bind *a priori* every State, be it a successor or predecessor State, "even without any conventional obligation" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

In that regard, to speak about the succession of substantive rules contained in universal treaties or general multilateral treaties adopted in the interests of the international community as a whole, like the Genocide Convention, is either superfluous or a wrong way of expressing, for those rules are *ab initio et suo vigore* binding on any successor State, regardless of the law on succession of States in respect of treaties.

152. The different position of the substantive and procedural provisions of universal treaties or general multilateral treaties which express

the interests of the international community as a whole is not contradicted by the legal nature of succession in respect of treaties, either. In fact, the expression "succession in respect of treaties" is in its brevity somewhat abstract and imprecise in this particular context. It is not the treaties *qua* legal acts which are the subject of succession, but rather the rights and obligations deriving from the treaties.

Substantive obligations in universal treaties being "the obligations of a State towards the international community as a whole" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33) are the obligations of "a State", regardless of its legal position in terms of whether it is a new State or the existing one. Opposite to them stand procedural provisions of such treaties, including provisions such as those of Article IX of the Genocide Convention which are not "obligations towards the international community as a whole", but obligations *intuitu personae* which are not binding upon the successor State without its consent.

153. The notification of succession to which the successor States resort in practice in order to be bound by the treaties of the predecessor State in its own right must be specific, in contrast to notifications confirming *ipso jure* the transfer of treaty rights and obligations of the predecessor to the successor State. They could not concern "a class of instruments", regardless of their ascertainability, but the specific treaty which was in force in relation to the predecessor State.

A synallagmatic obligation, being a specific obligation constituted *ex consenso*, cannot be undertaken like an obligation contemplated by the dictum of the Court in the *Nuclear Tests* cases, by the intention of a State solely. As regards those obligations, the intention of a State represents just a basis of consent as a legally designed intention for treaty law purposes. The notification of succession as developed in the practice of successor States is nothing else than a new, specific way of expressing consent to be bound by treaty in the case of succession. This point demonstrates the close relationship between the law of succession in respect of treaties and the law on treaties.

154. It is natural that the succession of States with respect to treaties has the closest link with the law of treaties itself and could be regarded as dealing with particular aspects of participation in treaties, the conclusion of treaties and the application of treaties. Special Rapporteur Humphrey Waldock described this link as follows:

> "the Commission could not do otherwise than examine the topic of succession of States with respect to treaties within the general framework of the law of treaties. . . the principles and rules of the law of treaties seemed to provide a surer guide to the problems of succession with respect to treaties than any general theories of succession"

(*Yearbook of the International Law Commission*, 1968, Vol. I, p. 131, para. 52).

Or as stated by O'Connell: "The effect of change of sovereignty on treaties is not a manifestation of some general principle or rule of State succession, but rather a matter of treaty law and interpretation." (D. P. O'Connell, *The Law of State Succession*, 1956, p. 15.)

155. The Convention on the Law of Treaties (1969) stipulates in Article 11 (Means of Expressing Consent To Be Bound by a Treaty): "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, *or by any other means if so agreed*." (Emphasis added.)

The Convention on Succession of States in respect of Treaties defines notification of succession as "any notification, however phrased or named, *made by a successor State expressing its consent to be considered as bound by the treaty*" (Art. 2, para. 1 *(g)* of the Convention, United Nations, *Treaty Series*, Vol. 1946; emphasis added).

It seems clear that the notification of succession as defined, being a means of "expressing consent" in relation to "the treaty", could hardly be understood, as the majority view suggests, as an abstract, generalized form of expressing an intention to be bound by an ascertainable class of treaty instruments.

156. *Tractu temporis*, the notification of succession becomes "other means" in the terms of Article 11 of the Convention on the Law of Treaties, of the expressing consent to be bound by the treaty designed for successor States on the basis of collateral agreement in simplified form between them and the parties to its predecessor's treaties. As such, the notification of succession is treated by the Secretary-General as depositary of multilateral treaties.

157. To that effect, the position of the Secretary-General, as depositary of multilateral treaties, seems clear:

> "Frequently, newly independent States will submit to the Secretary-General 'general' declarations of succession, usually requesting that the declaration be circulated to all States Members of the United Nations. The Secretary-General, duly complies with such a request. . . but does not consider such a declaration as a valid instrument of succession to any of the treaties deposited with him, and he so informs the Government of the new State concerned. In so doing, the Secretary-General is guided by the following considerations.
>
> The deposit of an instrument of succession results in having the succeeding State become *bound, in its own name, by the treaty to which the succession applies, with exactly the same rights and obligations as if that State had ratified or acceded to, or otherwise*

> *accepted, the treaty*. Consequently, it has always been the position of the Secretary-General, in his capacity as depositary, to record a succeeding State as a party to a given treaty solely on the basis of a formal document similar to instruments of ratification, accession, etc., that is, a notification emanating from the Head of State, the Head of Government or the Minister for Foreign Affairs, which should specify the treaty or treaties by which the State concerned recognizes itself to be bound.
>
> *General declarations are not sufficiently authoritative to have the States concerned listed as parties in the publication* Multilateral Treaties Deposited with the Secretary-General." (Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, doc. ST/LEG/7/Rev. 1, paras. 303-305 (footnote omitted); emphasis added.)

158. It should be noted that the Applicant itself, except for the purposes of the present proceedings, did not consider the FRY a party to the Genocide Convention nor to other multilateral treaties on the basis of the 1992 declaration. The general position of the Applicant in that regard was expressed in a letter of its Minister of Foreign Affairs addressed to the President of the Security Council dated 23 August 1993. That position was as follows:

> "As a result of the dissolution of the former State, the country known as the Federal Republic of Yugoslavia (Serbia and Montenegro) will have to deposit an instrument of succession to all international treaties it wishes to continue to be a party to." (United Nations doc. S/26349 (1993).)

The position, repeatedly raised on a number of occasions (United Nations doc. CERD/SP/51 (1994), p. 3; United Nations doc. CCPR/SP/40 (1994), p. 3; United Nations doc. CCPR/SP/SR.18 (1994), p. 3, para. 2; p. 6, para. 21, p. 7, para 23; United Nations doc. CCPR/SP/SP/SR.19 (1994), pp. 3, 4 and 8), was summarized in a letter of the Permanent Representative of Croatia of 30 January 1995 addressed to the Secretary-General in his capacity as depositary of multilateral treaties (United Nations doc. A/50/75-E/1995/10).

159. Commenting on a document regarding the "Status of succession, accession and ratification of human rights treaties by successors to the former Yugoslavia, the former Soviet Union and the former Czechoslovakia", the Permanent Representative of Croatia recalled that:

> "The representatives of the Federal Republic of Yugoslavia (Serbia and Montenegro) have been prevented from participating in international meetings and conferences of State[s] parties to multilateral treaties in respect of which the Secretary-General acts as depositary (i.e. Convention on Prohibitions and Restrictions of the Use of Certain Conventional Weapons which May be Deemed to be

> Excessively Injurious or to have Indiscriminate Effects, Convention on the Rights of the Child, International Convention on Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights, etc.) as the Federal Republic of Yugoslavia (Serbia and Montenegro) *had not acted according to international rules of succession of States. Namely, the Federal Republic of Yugoslavia (Serbia and Montenegro) had tried to participate in international forums as a State party without having notified its succession. . .*" (United Nations doc. A/50/75-E/1995/10; emphasis added.)

And, consequently, that:

> "*Should* the Federal Republic of Yugoslavia (Serbia and Montenegro) *express its intention to be considered a party*, by virtue of succession, to the multilateral treaties of the predecessor State with effect as of 27 April 1992, the date on which the Federal Republic of Yugoslavia (Serbia and Montenegro), as a new State, assumed responsibility for its international relations, the Republic of Croatia *would* take note of that notifications of succession." (*Ibid.*; emphasis added.)

(g) *Could the Respondent be considered a party to the Genocide Convention on the basis of the 1992 declaration and its conduct?*

160. It is true that, in the majority perception, the Respondent is considered a party to the Genocide Convention by the combined effects of the 1992 declaration and its "consistent conduct" as regards the Convention. This is suggested by the *conclusio* that "both the text of the declaration and Note of 27 April 1992, and the consistent conduct of the FRY at the time of its making and throughout the years 1992-2001" (Judgment, para. 117) give rise to the finding that the FRY was a Contracting Party to the Convention at the relevant time.

(It may, incidentally, be mentioned that the very reliance on the conduct of the Respondent, in the assessment as to whether it can be considered a Contracting Party to the Convention in the relevant period of time, represents by itself a tacit admission that the 1992 declaration was not capable of producing the effects attributed to it by the 1996 Judgment and by the subsequent decisions of the Court on its precedential authority.)

It transpires, consequently, that the "consistent conduct" of the FRY possesses substantive effects *in casu*, that "consistent conduct" as such is not a supportive argument for the understanding of the 1992 declaration as a notification of succession, but a basis *per se*. This is additionally sug-

gested by the fact that the *conclusio* does not refer to the 1992 declaration as an act, but to the text of the declaration. What is understood under "consistent conduct" in that perception? It appears that what is meant by "consistent conduct" are the actions and inactions of the FRY.

161. The actions in question are the following:

(i) that in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (preliminary objections phase), the FRY "argued that the Genocide Convention had begun to apply to relations between the two Parties on 14 December 1995" (Judgment, para. 114);

(ii) that the FRY "on 29 April 1999. . . filed in the Registry of the Court Applications instituting proceedings against ten States Members of NATO, citing *(inter alia)* the Genocide Convention as title of jurisdiction" (*ibid*., para. 114).

As regards the inactions of the FRY, according to the majority perception, the following inactions are relevant:

(i) that the FRY "did not repudiate its status as a party to the Convention even when it became apparent that that claim [continuity claim] would not prevail (*ibid*., para. 111);

(ii) that in the provisional measures phase of the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* the FRY "while questioning whether the Applicant State was a party to the Genocide Convention at the relevant dates, did not challenge the claim that it was itself a party" (*ibid*., para. 114);

(iii) that following its admission to the United Nations in 2000, the FRY "did not at that time withdraw, or purport to withdraw, the declaration and Note of 1992, which had been drawn up in the light of the contention that the FRY was continuing the legal personality of the SFRY" (*ibid*., para. 115).

162. The conduct of the FRY, according to the majority perception, attributes to the 1992 declaration the quality of "a valid and effective means by which the declaring State could assume obligations under the Convention" (Judgment, para. 110). For, as it is reasoned, the declaration "need not strictly comply with all formal requirements" *(ibid.)* having in mind that

> "For example, in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, the Court recognized the possibility that a State that had not carried out the usual formalities (ratification, accession) to become bound by the régime of an international convention might nevertheless 'somehow become bound in another way', even though such a process was 'not lightly to be presumed' to have occurred." *(Ibid.)*

Consequently, the conduct of the FRY possesses as regards the 1992 dec-

laration a convalidating effect, because *a contrario* it is devoid of any substance. The reasoning and *conclusio* of the majority simply call for comments.

163. The *rationale* of referring to the *North Sea Continental Shelf* cases is completely unclear, as the claim of the Respondents that the FRG was contractually bound by the 1958 Geneva Convention on the Continental Shelf, and in particular by its Article 6, "by conduct, by public statements and proclamations" (*I.C.J. Reports 1969*, p. 25, para. 27) was rejected in the Judgment and even in the opinions of Judges appended to it (*ibid.*, pp. 86, 155, 198, 242). As the Court stated,

> "only the existence of a situation of estoppel could suffice to lend substance to this contention, — that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice" (*ibid.*, p. 26, para. 30).

Needless to say, however, that such effects of past conduct are limited to a particular case, so that the actions or inactions of the FRY in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* as well as in the *Legality of Use of Force* cases are absolutely irrelevant *in casu*.

164. Even if, *arguendo*, the claim of Denmark and the Netherlands is acceptable, the requirement of a "very definite, very consistent course of conduct" (*ibid.*, p. 25, para. 28) on the part of the FRY would hardly have been met. For, in the preliminary objections phase in the *Legality of Use of Force* cases (*(Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, pp. 292-293, para. 29), as well as in the merits phase in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, the FRY clearly pointed out that it did not consider itself a Contracting Party to the Genocide Convention before the expression of consent in the form of accession on 6 March 2001 (effective 10 June 2001) (*(Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 77, para. 81).

165. Conduct in terms of actions and/or inactions of a party cannot be the means of binding a State by a treaty, because it is simply not a statement of the will of a State. As such, it can be an external, material expression of a certain intention of a State and, in that sense, the basis for a unilateral undertaking of an obligation, as demonstrated by the idea underlying the dictum of the Court in the *Nuclear Tests* cases. Unilateral undertaking of an obligation is, however, one thing, and acquiring the

status of a Contracting Party to a treaty as an act essentially characterized by synallagmaticity, is quite another thing (para. 134 above). Therefore, the means of expressing consent to be bound by a treaty is always a matter of concurrence of the wills of the negotiators, a part of the final clauses of a treaty having retroactive effects. Conduct of a State in terms of actions or inactions is not stipulated in the Genocide Convention nor in any other convention as a means of expressing consent to be bound. In contrast to the expression of consent to be bound by a treaty, the actions or inactions of a party to the dispute can constitute jurisdiction of the Court in a particular case by way of the mechanism of *forum prorogatum*.

166. If, as the majority reasons, the practice of a State is considered as a basis for acceptance of the conventional régime, the role of the 1992 declaration, both as a matter of logic and as a matter of law, is unclear within the framework of such reasoning.

As a matter of logic, in such a perception of the practice of a State, the 1992 declaration ought to be either irrelevant as such or only an element of the practice, together with other actions and/or inactions of a State. However, in the majority perception, the "consistent conduct" of the FRY and the 1992 declaration have been placed on the same level, as two equal and independent bases for the determination of the FRY as a Contracting Party to the Genocide Convention.

As a matter of law, in relation to the 1992 declaration and the "consistent conduct" of the FRY, as projected by the majority, it appears that the latter has been attributed the convalidating role as regards the deficiencies of the declaration. It is hardly possible, in the circumstances surrounding the present case, that the practice may have a convalidating role. For, *in concreto*, what is involved here is the incapability of the 1992 declaration, in the light of the rules of general international law, to produce a proper legal effect, and not the defects of consent *(vices de consentement)* which, as a rule, may be convalidated by the actions or inactions of the State concerned. The practice of the Respondent, as perceived by the majority, should, in fact, remove the objective deficiencies of the 1992 declaration which are not in the domain of the will of its authors and, as such, cannot be affected by its actions and/or inactions.

(h) *Legal effects of the admission of the FRY/Serbia to the United Nations as a new State*

167. In the absence of the rule on automatic succession as regards the multilateral treaties applicable to the present case, the admission of the FRY/Serbia to the United Nations is unavoidably reflected on its status vis-à-vis the Genocide Convention due to the specific circumstances surrounding its admission to the United Nations. That was not only the

admission to the membership in the ordinary sense, but an admission followed by the determination of the legal personality of the FRY in terms of continuator/successor dichotomy.

This element is highly relevant *in casu*. In the case that the FRY continues the legal personality of the SFRY, it would be a Contracting Party to the Genocide Convention on the basis of the deposition of the instruments of ratification of the SFRY, without reservation, on 25 August 1950. The position of the FRY as a successor State puts the matter on a different legal level, as demonstrated by the actions taken by the Secretary-General as depositary of multilateral treaties (paras. 173, 176-178 below).

168. At the end of the year 2000 the FRY did two things:

(a) it renounced the continuity claim and accepted the status of the successor State of the former SFRY; and

(b) it proceeded from a qualitatively new legal basis — as the successor State — and on that basis submitted the application for admission to membership in the United Nations.

169. The State, as a notion of international law, comprises two elements, i.e., possesses two faces:

(a) statehood in the sense of the relevant attributes such as defined territory, stable population and sovereign power;

(b) legal personality, i.e., the status of a subject of international law equipped with a *corpus* of rights and obligations. The legal personality of the FRY, in the light of the relevant circumstances surrounding it, can either be of an inferential, derivative nature — based on the legal identity and continuity with the SFRY — or of an inherent, original nature — based on the status of a new State.

170. By submitting the application for admission to membership in the United Nations, the FRY not only renounced the claim to legal identity and continuity but claimed at the same time to be accepted as a new State in the sense of some other, different legal personality from the one claimed until the year 2000 — a successor State versus the continuator of the former SFRY.

171. The admission of the FRY to membership of the United Nations from 1 November 2000 also meant the acceptance of the claim of the FRY to be accepted as a new State in the sense of a new international personality different from its hybrid and controversial personality in the period 1992-2000. The claim was accepted by way of a series of collateral agreements in a simplified form, or a general collateral agreement in a simplified form, between the FRY, on the one hand, and the Member States of the United Nations and the World Organization itself, on the other. The subject of the series of collateral agreements, or of the general collateral agreement as well as explicit statements, is recognition of the FRY as a new personality, a personality of the successor State of the

former SFRY, and, in that capacity it was admitted to the World Organization as a Member. Thus, the FRY, although being the "old State" in the sense of statehood, was universally recognized as a "new State" in the sense of its international legal personality. As far as the FRY after the year 2000 is concerned, its legal existence as a new international legal personality started in November 2000 by its admission to membership in the United Nations.

172. As regards the claim of the FRY to be accepted as a successor State, the following explicit statements are relevant: Statements made upon the admission of FRY to membership in the United Nations on 1 November 2000 by the Non-Aligned Movement; Germany, on behalf of the Western European and Other States Group; France, on behalf of the European Union and the Central and Eastern European countries associated with the European Union, the associated countries of Cyprus, Malta and Turkey, and the EFTA countries members of the European Economic Area; Croatia and Slovenia. See also document A/55/522-S/2000/1028 (letter dated 25 October 2000 from the Permanent Representative of the former Yugoslav Republic of Macedonia to the United Nations addressed to the Secretary-General) containing, in an annex thereto, the following joint statement made at the Informal Summit of the Heads of State and Government of the countries participating in the South-East European Cooperation Process:

> "We strongly encouraged the commitment of the Federal Republic of Yugoslavia to follow a policy of good-neighborly relations, reconciliation and mutual understanding in the region, as well as respect for the principle of equality and non discrimination of all the successor States of the former Yugoslavia in their mutual relations.'" (Non-paper of the United Nations Legal Counsel attached to his letter to the Minister of Foreign Affairs of the Federal Republic of Yugoslavia dated 8 December 2000, Ann. 23 of the Preliminary Objections of the FRY.)

(i) *The relevance of the Secretary-General's/Secretariat's action in the exercise of the depositary function*

173. Although the Secretary-General, in the capacity of depositary of the Genocide Convention, is not invested with any autonomous, substantive competence in terms of the determination of whether the FRY was viewed, or could be viewed, as qualifying to be a party to the Genocide Convention, his actions are not *a priori* devoid of any effects, which the complete ignoring of his actions might suggest. After all, his functions of depositary of multilateral treaties would be devoid of any substance.

In the present case the actions taken by the Secretary-General as regards the position of the FRY vis-à-vis the Genocide Convention are of a specific nature. They must be viewed in the totality of his competences as one of the principal organs of the Organization. In a case like the

present one, actions of the Secretary-General in the capacity of executive organ of the Organization and depositary of multilateral treaties respectively, are inevitably interrelated but distinguishable.

174. In closely related cases, the Court heavily relied on the pronouncements of the Secretary-General in its Judgment in the preliminary objections phase (1996) and found, with regard to the Sixth Preliminary Objection raised by the FRY, that

> "Bosnia and Herzegovina could become a party to the Convention through the mechanism of State succession. Moreover, the Secretary-General of the United Nations considered that this had been the case" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 611, para. 20).

The Court took also note of this consideration of the Secretary-General in its Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 16, para. 25).

175. In paragraph 44 of that same Judgment the Court rejected the Second Preliminary Objection of the FRY, in which Mr. Alija Izetbegović "was not serving as President of the Republic. . . at the time at which he granted the authorization to initiate proceedings" (*I.C.J. Reports 1996 (II)*, pp. 621-622), and in the reasoning and in the wording practically repeated the consideration which Mr. R. Zacklin, then Director and Deputy to the Under-Secretary-General in charge of the Office of Legal Affairs, made in his letter of 25 March 1993 addressed to the Registry of the Court. In that letter it is said that "[i]n the United Nations and in the International Conference on the former Yugoslavia, Mr. Izetbegović has been regarded and continues to be regarded as the President of Bosnia-Herzegovina" (dissenting opinion of Judge *ad hoc* Kreća, *I.C.J. Reports 1996 (II)*, p. 704, para. 37). The same finding is included in the Court's Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 11, para. 13).

It appears that in the 1996 Judgment, the Court took the above decision, on the basis of a consideration of an official of lower rank than the Secretary-General, in a matter which as such touches the constitutional system of Bosnia and Herzegovina, which did not contain, as it does not contain at present, the institution of an individual Head of State but a collective one.

176. Following the admission of the FRY to membership of the United Nations on 1 November 2000, the Legal Counsel of the United Nations sent, on 8 December 2000, a letter addressed to the Minister of Foreign Affairs of the FRY, expressing, *inter alia*, that "the Federal Republic of Yugoslavia should now undertake treaty actions, as appropriate, in relation to the treaties concerned, if its intention is to assume the relevant legal rights and obligations as a successor State".

177. In the non-paper of the UN Legal Counsel entitled "Admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000: Implications for Treaties Deposited with the Secretary-General", the view is elaborated in detail. It starts with the finding that:

> "1.3. The admission of the FRY to membership in the United Nations on 1 November 2000 has raised a number of issues relating to treaty actions undertaken by the FRY in relation to multilateral treaties accepted in deposit by the Secretary-General, and recorded against the name 'Yugoslavia';
>
> . . . . . .
>
> 2.1. Four major categories of treaty actions are at issue:
>
> *(a)* Treaty actions undertaken by the SFRY prior to 27 April 1992 (Annex A);
> *(b)* Treaty actions undertaken by the FRY between 27 April and 1 November 2000, pursuant to its previous claim to continue the legal personality of the SFRY (Annex B);
>
> *(c)* Treaty actions undertaken by the FRY, in its own right, and not dependent on prior treaty actions by the SFRY (Annex C); and
> *(d)* Treaty actions undertaken by the FRY, which require membership in the United Nations or a specialized agency as an essential precondition (Annex D). Treaty actions relating to the International Court of Justice and the Constitution of the World Health Organization have been addressed separately (see paragraphs 8 and 9 below).
>
> . . . . . .
>
> 4.1. In the light of the circumstances of FRY's admission to membership in the United Nations on 1 November 2000, it would be proper for the depositary to treat the Federal Republic of Yugoslavia as a 'Newly Independent State'.
>
> 4.2. *The international community appears to agree that the FRY's admission to membership in the United Nations on 1 November 2000, together with its declaration make it a successor State with the requirement that it comply with the principle of equality among the successor States to the former SFRY. . . Accordingly, the FRY should be treated as a new State* as described in the Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties (ST/LEG/7/Rev.1, p. 87, para. 289).
>
> 4.3. *[T]he FRY, as the new State that came into existence on 27 April 1992, may now wish to succeed to treaty actions undertaken by the SFRY prior to this date.* This would include treaties to which the SFRY was a party." (Ann. 23 of the Preliminary

Objections of the Federal Republic of Yugoslavia, 2002; Emphasis added.)

178. The determination that the FRY is qualifying to become a party to the Genocide Convention is necessarily implied in the very decision of the General Assembly, upon the recommendation of the Security Council, to admit the FRY to the membership of the United Nations not only as a new Member but as a successor State at the same time. For, as United Nations Secretary-General Kofi Annan stated in his letter to the President of the United Nations General Assembly dated 27 December 2001:

> "I have the honour to refer to General Assembly resolution 55/12 of 1 November 2000, in which the Assembly decided to admit the Federal Republic of Yugoslavia to membership in the United Nations. This decision necessarily and automatically terminated the membership in the Organization of the *former* Yugoslavia, the State admitted to membership in 1945." (United Nations doc. A/56/767; emphasis added.)

That action clearly belongs to the Secretary-General as the executive organ of the Organization. Although far from being consistent in legal terms, it undoubtedly results from the decision taken by the principal political organs of the United Nations — the General Assembly and the Security Council — in respect of the question of the admission of a State to United Nations membership, which is in their exclusive competence. (Such an interpretation was advocated in the literature as well. In an article entitled "The New United Nations and Former Yugoslavia", Professor Rosalyn Higgins wrote:

> "The Assembly did recommend that the *new Federal Republic (Serbia-Montenegro) should apply for membership of the United Nations*. But the resolution did not either suspend, or terminate, Yugoslavia's *membership* in the UN. The outcome had been anomalous in the extreme. The seat and nameplate remain as before. The old Yugoslav flag continues to fly on 42nd Street. *'Yugoslavia' remains a member of the UN, i.e. not Serbia-Montenegro, but Yugoslavia in its entirety*." (*Op. cit.*, p. 479; emphasis added.)

This necessarily means, as the Legal Counsel of the United Nations pointed out in the above-cited non-paper entitled "Admission of the Federal Republic of Yugoslavia to the United Nations on 1 November 2000: Implications for Treaties Deposited with the Secretary-General" that "the FRY, as the new State that came into existence on 27 April 1992, *may now wish to succeed to treaty actions undertaken by the SFRY prior to this date*" (emphasis added). As regards the Genocide Convention, the SFRY undertook a treaty action on 29 August 1950 in the form of ratification pursuant to Article XI of the Convention.

179. In these circumstances, the Respondent was fully entitled to express its consent to be bound by the Genocide Convention in the form of accession like a number of other successor States (footnote 11).

The right of accession of a successor State to a treaty such as the Genocide Convention derives from its very nature as a general international treaty, expressing the interests of the international community as a whole. As the Court stated in its Advisory Opinion in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, "[I]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention" (*I.C.J. Reports 1951*, p. 23). Such a nature of the Genocide Convention implies

> "that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis." (*Ibid.*, p. 24.)

180. Accession of a State to the Convention, therefore, appears to be an application of the demand for the participation in the Convention of as many States as possible. This is so, regardless of the nature of the accession to the multilateral treaties expressing the interests of the international community as a whole within the positive law.)

As regards those treaties, the right of accession must be treated as a *jus cogens* rule. In reality, the exercise of that right, bearing in mind the effects of the substantive provisions of such treaties, possesses constitutive effects only in regard of the provisions other than the substantive ones.

181. The Respondent's accession to the Genocide Convention is, in some part, unusual. The standard notification of accession is accompanied by the explanation of the legal position of the FRY in terms of the dichotomy continuator/successor State and its consequences for the status of the FRY vis-à-vis the Genocide Convention.

The explanation notes, first of all, that the FRY declared on 27 April 1992 that it,

> "continuing the State, international legal and political personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" (notification of accession of the FRY, Preliminary Objections of Serbia, Ann. 5).

Further, that

> "the contention and assumption of continuity was eventually not

> accepted by the United Nations, nor was it accepted by other successor States of the Socialist Federal Republic of Yugoslavia, and thus it produced no effects" (notification of accession of the FRY, Preliminary Objections of Serbia, Ann. 5).

And, finally, that

> "it has been established that the Federal Republic of Yugoslavia has not succeeded on April 27, 1992, or on any later date, to treaty membership, rights and obligations of the Socialist Federal Republic of Yugoslavia in the Convention on the Prevention and Punishment of the Crime of Genocide on the assumption of continued membership in the United Nations and continued state, international legal and political personality of the Socialist Federal Republic of Yugoslavia" *(ibid.)*.

A couple of observations seem relevant *in concreto*:

First, the explanation is an integral part of the FRY's notification of accession to the Genocide Convention, making a logical and legal union with the statement of accession;

Second, the substance of the explanation corresponds to the objective legal position of the FRY, established by the admission of the FRY to the United Nations on 1 November 2000;

Third, the substance of the explanation corresponds to the action taken by the Secretary-General of the United Nations in his capacity as depositary of multilateral treaties;

Fourth, the FRY's notification of accession is generally accepted by the Contracting Parties to the Genocide Convention, with three objections (Croatia, Sweden and Bosnia and Herzegovina): it was accepted as a whole, together with the provided explanation.

182. Accession is a valid means of expression of consent to be bound by a treaty in terms of the law of treaties and, as such, specifically provided in Article XI of the Genocide Convention.

In view of the fact that automatic succession in respect of treaties is not a part of positive international law, successor States are free, acting as regards multilateral treaties of predecessor States in their own name, to choose the means of expressing consent to be bound by a concrete treaty within the framework of the means stipulated by the treaty. Considering such a state of facts, there is no difference in substantive terms whatsoever between accession and notification of succession as developed in the practice of successor States. For, acting in its own name, the successor State, in its notification of succession, also determines the date from which it considers itself bound by the concrete treaty and which need not necessarily concur with the date of succession (para. 148 above).

183. Article XI of the Genocide Convention provides:

> "The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.
>
> The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
>
> After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.
>
> Instruments of accession shall be deposited with the Secretary-General of the United Nations." (United Nations, *Treaty Series, (UNTS)*, Vol. 78, 1951; footnotes omitted.)

It appears that accession is not only established as a means of expression of consent to be bound by the Convention, but that it is a means specifically designed for non-original Contracting Parties, i.e., those which consent to be bound by the Convention after 1 January 1950.

184. Consequently, there remains the question whether the provisions of Article XI of the Convention are also equally applicable to the successor States. Article XI does not contain any indication, let alone any element given *explicite*, to the effect that accession, as a means of expression to be bound by the Convention, is not applicable as regards successor States. No corresponding limitation exists in the law on succession in respect of treaties, either. Moreover, the relevant rules of the law on succession appear to suggest quite the contrary, granting a successor State the right of option in that regard. For, if a successor State, according to Article 17 of the Convention, has the right to choose to become a party to multilateral treaties "independently of the consent of the other States parties and *quite apart from the final clauses of the treaty*" (*Yearbook of the International Law Commission*, 1974, Vol. II, Part One, p. 215, para. 2; emphasis added), then that right belongs *a fortiori* to a successor State in case it has been provided by the treaty.

185. The reservation of the FRY to Article IX of the Convention was completely ignored, although the reservation, in the light of the relevant rules of the law of treaties, is of far-reaching importance as regards the jurisdiction of the Court *in casu*. The FRY sent a notification of accession to the Secretary-General of the United Nations as its depositary on 6 March 2001, containing a reservation to Article IX of the Convention to the effect that:

> "The FRY does not consider itself bound by Article IX of the Convention on the Prevention and Punishment of the Crime of

> Genocide, and, therefore, before any dispute to which the FRY is a party may be validly submitted to the jurisdiction of the International Court of Justice under this Article, the specific and explicit consent of the FRY is required in each case." (United Nations doc. C.N.945.2006.TREATIES-2 (Depositary Notification).)

In a Note dated 21 March 2001 the Secretary-General stated, *inter alia*, that "[d]ue note has been taken of the reservation contained in the instrument" *(ibid.)*.

On 18 May 2001 the Permanent Representative of Croatia sent a communication to the Secretary-General, stating *inter alia*:

> "The Government of the Republic of Croatia objects to the deposition of the instrument of accession of the Federal Republic of Yugoslavia to the Convention on the Prevention and Punishment of the Crime of Genocide, due to the fact that the Federal Republic of Yugoslavia is already bound by the Convention since its emergence as one of the five equal successor States to the former Socialist Federal Republic of Yugoslavia.
>
> . . . . . .
>
> The Government of the Republic of Croatia further objects to the reservation made by the Federal Republic of Yugoslavia in respect of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, and considers it to be incompatible with the object and purpose of the Convention. The Government of the Republic of Croatia considers the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX." (*Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 2002*, United Nations doc. ST/LEG/SER./E/21, p. 129.)

186. Thus, the objection of Croatia concerns two things:

(i) accession as a means of expressing consent of the FRY to be bound by the Genocide Convention; and
(ii) the reservation of the FRY made in respect of Article IX of the Convention.

In concreto, the objection to the reservation in respect of Article IX is of interest, having in mind the fact that Croatia considers "the Convention on the Prevention and Punishment of the Crime of Genocide to be fully in force and applicable between the Republic of Croatia and the Federal Republic of Yugoslavia, including Article IX".

In that regard it seems clear that the objection to Article IX, supported by the fact that Croatia is not opposed to the entry into force of the Convention between itself and the Respondent, makes automatically applica-

ble paragraph 3 of Article 21 of the Convention on the Law of Treaties, which stipulates:

> "When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the reserving State and the objecting State to the extent of the reservation."

187. The action taken by the Secretary-General through the Legal Counsel in regard to the deposited multilateral treaties, including the Genocide Convention, is basically of an administrative nature, a sort of reminder of the necessary consequences resulting from the fact that by the act of admission of the FRY, it was at the same time accepted and recognized, implicitly and explicitly, as a new personality both by the Organization itself and its member States (paras. 167-173 above) and implemented in the total structure of the Organization. As such, it fits perfectly the function of the depositary provided by Article 77, paragraph 1 *(e)*, of the Convention on the Law of Treaties, i.e., "[i]nforming the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty" (United Nations, *Treaty Series*, Vol. 1155).

3. Preliminary objection to the jurisdiction of the Court, and to admissibility ratione temporis

188. This particular objection of the Respondent is treated by the majority "at one and the same time [as] an objection to jurisdiction and one going to the admissibility of the claims" (Judgment, para. 120), consequently, as "two inseparable issues in the present case" (*ibid.*, para. 129).

Innovativeness of such a treatment of the issues of the scope of the jurisdiction of the Court *ratione temporis* and the admissibility of claims is accompanied by a contradictory reasoning. For, if the essential characteristics of an objection to jurisdiction is in that "if upheld, it brings the proceedings in respect of that claim to an end" (*ibid.*, para. 120) and objections to admissibility, as observed by reference to the Judgment in the *Oil Platforms* case "normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct" *(ibid.)*, the Court nonetheless declines to hear the case, it is unclear how two such objections can be considered inseparable issues. For, whereas the objection to jurisdiction concerns the existence of the jurisdiction of the Court *ad casum,* an objection to inadmissibility, as accepted by the majority, is concerned with the performance of the jurisdiction that is established.

189. It is true that the Respondent formulated this objection in the sense that "claims based on acts and omissions which took place prior to

27 April 1992 are beyond the jurisdiction of this Court and inadmissible" (CR 2008/12, p. 68). It is equally true, however, that it is up to a party to the dispute, *in concreto* the Respondent, to *present* its objection(s) to jurisdiction, and that it is up to the Court to make the determination on the basis of final submissions and, if necessary, other pertinent evidence, the real meaning of a jurisdictional objection. This would not be a matter which touches upon the power of the Court to "'substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced' (*P.C.I.J., Series A, No. 7*, p. 35)" (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30), but a matter of the objective determination of a legal issue.

It seems, based on the wording of this particular objection of the FRY, as well as on the reasons advanced, that it is rather an objection to the scope of the jurisdiction *ratione temporis*, whereas admissibility could be an alternative objection.

190. It appears that the majority fails to pay due regard to the fact, which any legal reasoning must obey, considering that it expresses the iron law of logic and common sense itself. And, that is, that any legal personality, including a State, might bear responsibility or be subject to the legal procedure, only if it exists and during the period of time of its existence. *In concreto*, it seems obvious that the Court may have jurisdiction starting only on 27 April 1992, when the Respondent was constituted as the legal person in terms of international law — for acts or omissions which may be attributed to it.

The term "State" in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83, 12 December 2001) possesses a clear and precise meaning. It is certainly not a State in an abstract or metaphysical sense, but a real State, a State in existence. Only a State in existence, bound by an international obligation, may commit an internationally wrongful act that entails international responsibility. The same holds true, *mutatis mutandi*, also for the term "State" or "party" used both in the Statute and in the Rules of Court. Jurisdiction of the Court, either *stricto* or *lato sensu*, cannot be established in relation to a non-existent State.

191. In the law of State responsibility, the only exception to that iron rule of logic is the mechanism of succession in respect of treaties of delictual responsibility. The Applicant refers to the rule provided in Article 10, paragraph 2, of the ILC's Articles on State Responsibility, according to which "'the conduct of a movement insurrectional or other which succeeds in establishing a new State shall be considered an act of the new State under international law'" (Judgment, para. 125).

192. Two observations seem relevant in that regard:

First, the mechanism of succession in respect of delictual responsibility is not a part of *lex lata*;

Second, this particular assertion of the Applicant seems manifestly

absurd, in serious conflict with common sense and cogent legal considerations. The assertion that the FRY — which is, in fact, a part of the SFRY that remained after the successive recessions of the four former federal units, including Croatia, and whose legal position in terms of legal identity and continuity with the SFRY was the subject of vehement legal and political confrontations in the international community — came into being as a consequence of a successful insurrectional movement, hardly deserves another qualification. Besides, it turns out that the "successful insurrectional movement" grew into the youngest successor State in the territory of the former SFRY, following the four successive secessions of the former Yugoslav republics, ending the process of its dissolution.

It appears that such an assertion is rather a matter of litigation strategy. In the majority view, the determination of questions relating to the assertion of the Applicant regarding the insurrectional nature of the FRY would require it "to enter into an examination of factual issues concerning the events leading up to the dissolution of the SFRY and the establishment of the FRY" (Judgment, para. 127). It appears, however, that examination of the relevant factual issues *in concreto* is not a sufficient basis for the determination of this particular objection of the Respondent as one having no exclusively preliminary nature.

193. The issue of the dissolution of the SFRY is of a mixed nature, being a *questio juris et questio facti* at the same time, since it is based on the principles of international law which serve to define the conditions in which an entity constitutes a State or disappears as a State. As regards the *questio facti* aspect of the dissolution of the SFRY, the relevant facts have been clearly established by the Arbitration Commission and accepted by the international community as well as by the successor States of the SFRY.

According to Opinion No. 1 of the Arbitration Commission (*International Legal Materials*, Vol. 31 (November 1992), p. 1496), due to the fact that the republics, more precisely Slovenia, Croatia, Bosnia and Herzegovina and Macedonia "have expressed their desire for independence" the "composition and workings of the essential organs of the Federation . . . no longer meet the criteria of participation and representativeness inherent in a federal State" and, consequently, "the SFRY is in the process of dissolution". The process was completed — as stated by the Commission in its Opinion No. 8 (*ibid.*, p. 1523), adopted with respect to the question posed on 18 May 1992 by Lord Carrington — with the constitution of the Federal Republic of Yugoslavia as a new State that on 27 April 1992 adopted a new Constitution (92 *International Law Reports (ILR)* 167). *Ergo*, these facts, being established and accepted, did not even call for a special examination, but were simply to be perceived or taken cognizance of.

Finally, even if these facts ought to have been the subject of examination, they were obviously not of such a nature as to be preclusive of the matter. As such they are issues that "may be by no means divorced from

the merits. A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them." (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56, para. 18 *(c)*). It might rather be said that they touch

> "on a point of merits, but . . . only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 37, para. 59.)

194. The extension of the scope of the jurisdiction of the Court *ratione temporis* to the events that occurred before 27 April 1992 radically modified the characterization of the case in terms of responsibility. Considering that in the period preceding 27 April 1992 the Respondent did not exist as a State, extension of the scope of the Court's jurisdiction *ratione temporis* can mean two things:

(i) that the responsibility claim was addressed to a dead, non-existent State; or

(ii) that, assuming hypothetically that there exists the rule of positive international law regarding succession in respect of delictual responsibility, the responsibility claim of the Applicant as such, apart from the jurisdictional side of the matter, represents, in fact, a claim for joint and several responsibility of Serbia, Montenegro, as well as Bosnia and Herzegovina and Macedonia, either of both or of Macedonia alone, depending on the moment of occurrence of the events alleged by the Applicant in its Memorial, as successor States which the territorially reduced SFRY comprised in that period.

4. Preliminary objection to the admissibility of claims relating to the submission of certain persons to trial, provision of information on missing Croatian citizens, and return of cultural property

195. Given the unusual understanding of the jurisdiction of the Court *ratione personae et materiae* (paras. 18-20 above), this particular objection remains simply "preliminary objection" and is treated as such.

In fact, all three issues included in this particular objection are *par excellence* issues of the jurisdiction of the Court *ratione materiae* that should be assessed in terms of whether there is a dispute between the Parties that falls within the scope of Article IX of the Genocide Convention. Article IX states that:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including

those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

196. As regards the submission of certain persons to trial, it seems obvious that it is essential that certain conditions be met in order that the dispute regarding the submission could be considered as a dispute falling within the ambit of Article IX of the Convention. Firstly, that the persons accused of genocide or any other acts enumerated in Article III of the Convention have precisely been identified in due procedure provided for by the law of the ICTY. Further, that it has been shown that persons charged by the ICTY Prosecutor with acts of genocide committed in Croatia are to be found in the territory of the Respondent or territory within its control. Finally, that the Applicant did not take effective steps to submit those persons to the ICTY as a "competent international penal tribunal" in terms of Article VI of the Convention. It seems that none of these preconditions have been fulfilled.

197. It is a matter of common knowledge that not a single citizen of the Respondent has been accused of genocide or other acts enumerated in Article III of the Convention, allegedly committed in the territory of Croatia. (As to the part of the submission relating to the former President, Mr. S. Milosević, it is not only moot but, as presently designed, it implies the existence of a sort of *actio popularis*, which is obviously totally erroneous (see *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 47, para. 88).)

It is in that sense that the Applicant has invoked the Genocide Convention, since it refers to "trial before the appropriate judicial authority" (submission 2 *(a)* in the Memorial) and not to the "international penal tribunal" in terms of Article VI of the Convention.

Therefore, it is only in the case of accumulation of certain elements of the dispute as regards the "submission of certain persons to trial" in the terms of the Genocide Convention that it would fall within the jurisdiction of the Court *ratione materiae*.

The Applicant probably has in mind the submission of certain persons indicted for genocide by its organs, which are not verified by the Chief Prosecution and the ICTY itself, for trial before its national criminal courts. If so, the Applicant's submission is rather a matter of application of treaty rules in force between Croatia and Serbia on legal assistance in criminal matters.

198. It is however true, that in the oral proceedings counsel for Croatia referred, *inter alia*, also to the ICTY, by saying: "persons found in Serbia suspected of committing genocide in Croatia can still be submitted to trial before the ICTY — which is a tribunal —, and *Serbia would, on that hypothesis still have obligations to fulfil*" (CR 2008/13, p. 35 (Crawford);

emphasis added). The Applicant, in fact, presumed that a number of perpetrators so charged are in Serbia (CR 2008/10, p. 15 (Šimonović)).

By reference to the ICTY the matter is prima facie brought into *nexus* with the Genocide Convention. That *nexus* is, however, of hypothetic nature and, as such, it is beyond the jurisdiction of the Court. On this particular point, in fact, there does not exist an actual, real, dispute as a primary condition for the Court to exercise its judicial function, but a hypothetic dispute.

For the dispute between the Parties is one thing, and the dispute before the Court is quite another. What, in effect, does the Applicant contend? On the one hand, that the persons charged with genocide by the Croatian authorities are *presumably* staying in Serbia and, on the other, that these persons, who *may* be staying in Serbia, *might* be accused in a proper procedure before the ICTY, as a competent international penal tribunal, which *might* then activate the obligation of Serbia to co-operate with the ICTY. The Respondent denies that contention, putting forward arguments which appear relevant to it.

199. Consequently, it is indisputable that there are clearly opposite views, a disagreement about the submission of Croatia. But, such a disagreement is not sufficient to constitute the dispute before the Court to fall within the competence of the Court *in casu*.

It is of an abstract, hypothetical nature in view of the fact that the submission of the Applicant is subjected to a triple qualification:

(a) that the persons charged with genocide by the Croatian authorities are staying in the territory of Serbia;
(b) that the ICTY bring in an indictment against them; and
(c) that Serbia, explicitly or tacitly, refuse to co-operate with the ICTY.

200. Thus, it appears that, in actual fact, there does not exist a dispute between the Parties in terms of the well-known definition given in the case concerning *Mavrommatis Palestine Concessions*. According to that definition the dispute is a "disagreement on a point of law or fact, a conflict of legal views or interests between two persons" (*Judgment No. 2, 1924*, *P.C.I.J., Series A, No. 2*, p. 11).

The Parties are, in essence, not disputing a point of law, because the Respondent does not deny the obligation to co-operate with the ICTY in terms of Article VI of the Convention. For its part, the Applicant does not deny that the ICTY has not accused any of the Respondent's citizens of the crime of genocide allegedly committed in the territory of Croatia.

Accordingly, what remains as a possible subject of dispute before the Court is a disagreement on a point of fact. However, *in concreto*, the "fact" in terms of a thing that exists or occurred simply is not present.

What the Court is really faced with is not a "fact", but a presumed fact or a hypothetical fact. Dealing with presumed facts or hypothetical facts however is outside the purview of the judicial function of the Court because of cogent legal considerations. For, as the Court stated in the case concerning *Northern Cameroons*:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication *an actual controversy* involving a conflict of legal interests between the parties. *The Court's judgment must have some practical consequence* in the sense that it can affect existing legal rights and obligations of the parties, thus removing uncertainty from their legal relations." (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)

It would be incompatible with the judicial function of the Court to render judgments which would be dependent on the existence of facts or situations to which a party refers.

201. The majority's conclusion as regards the duty of prosecution and punishment that "[t]hese issues are clearly matters of interpretation or application of the Genocide Convention" (Judgment, para. 136) seems correct but abstract, since it is not followed by a proper *conclusio*. The Genocide Convention does not contain the principle of universal repression. States are "obliged to punish persons charged with the commission of acts coming under the Convention insofar as they were committed in their territory" (N. Robinson, *The Genocide Convention, its Origins and Interpretation*, 1949, p. 31).

In its Judgment in the *Bosnia* case, the Court stated clearly:

> "Even if Serbian domestic law granted jurisdiction to its criminal courts to try those accused, and even supposing such proceedings were compatible with Serbia's other international obligations, *inter alia* its obligation to co-operate with the ICTY, to which the Court will revert below, an obligation to try the perpetrators of the Srebrenica massacre in Serbia's domestic courts cannot be deduced from Article VI. Article VI only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction; while it certainly does not prohibit States, with respect to genocide, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused, it does not oblige them to do so." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, pp. 226-227, para. 442.)

The idea underlying the *conclusio* of the majority seems to be the under-

standing that, if a person charged in State A with acts of genocide committed in its territory is found in the territory of State B, a party to the Genocide Convention, that State would be under an obligation to co-operate in the arrest and extradition of such a person. Such an understanding seems erroneous for two principal reasons:

First, the duty to co-operate in the Convention is limited to co-operation with international penal tribunals (Art. VI of the Convention);

Second, it runs counter to the general principle of international criminal law in that regard — *aut dedere, aut punire*. The duty to extradite might be established on the basis of a treaty, bilateral or multilateral, on legal assistance in criminal matters only!

202. It is completely unclear how the dispute on the information on missing persons falls within the jurisdiction of the Court *ratione materiae* under the Genocide Convention. Co-operation of that kind between the Contracting Parties is not envisaged by the Convention. In the concrete case, the object are the bilateral treaty instruments, so this is rather a dispute about its fulfilment.

203. The majority reasoning as regards the return of items of cultural property (submission 2 *(c)*) is, it seems, not in harmony with its *conclusio*. If the majority sees "no reason to depart from its earlier finding on the general question of interpretation of the Convention in this respect" (Judgment, para. 141), it is not clear how it came to the *conclusio* that the objection raised by Serbia is not of an exclusively preliminary nature.

In the *Bosnia* case, the Court found, *inter alia*, that the deliberate destruction of the historical, cultural and religious heritage "does not fall within the categories of acts of genocide set out in Article II of the Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007 (I)*, pp. 185-186, para. 344. It is *a fortiori* valid for acts of seizure of those items of cultural property. If so, the dispute regarding the return of items of cultural property cannot be considered as falling within the jurisdiction *ratione materiae* of the Court on the basis of Article IX of the Convention, which perceives genocide in terms of physical or biological destruction of the relevant group as such.

204. The majority's consideration that the claim of Croatia includes "disputed matters of fact" (Judgment, para. 143), appears to be irrelevant in the light of the fact that as a matter of law the so-called cultural genocide does not fall within the scope of the Genocide Convention.

Both objections of the Respondent are determined by the majority as objections having no exclusively preliminary character on the basis of the consideration that it includes disputed matters of fact inappropriate to be examined in the present phase of the proceedings.

In that regard, a different treatment of the disputed matters of fact in

closely related cases seems evident. I have in mind the treatment of the disputed facts in the Order of 8 April 1993 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, I.C.J. Reports 1993*, p. 25), followed by the Order of 13 September 1993 (*ibid.*, pp. 349-350) as well as the Orders of 2 June 1999 in the ten *Legality of Use of Force* cases (*(Yugoslavia* v. *Belgium), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 138, para. 39) regarding facts that possess a sufficiently clear manifestation of genocidal intent, a matter much more demanding than the matter involved in this particular issue.

(Signed) Milenko KREĆA.